

***United States Court of Appeals
for the Second Circuit***



APPENDIX

15-7241

United States Court Of Appeals
Second Circuit

James C.Gabriel,Pro Se,

75-7241

Objectant-Appellant,

-against-

Betty Levin,Alleghany Corporation
And Robert LeVasseur,

Plaintiffs-Appellees,

and

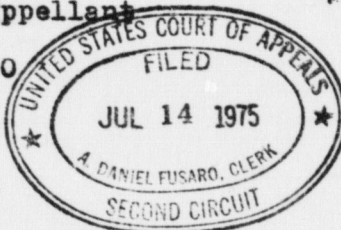
Mississippi River Corporation,
Missouri Pacific Railroad Company,
Robert H.Craft,T.C.Davis and
Thomas F.Milbank,

Defendants-Appellees

On Appeal From The United States District Court
For The Southern District Of New York

Appendix To Brief For James C.Gabriel,Pro Se,Appellant

James C.Gabriel,Pro Se,Appellant
Post Office Box 94
Sea Girt,New Jersey 08750
(201) 899-6200



PAGINATION AS IN ORIGINAL COPY

INDEX TO THE APPENDIX OF APPELLANT JAMES C.GABRIEL, PRO SE

ITEM

PAGES

DOCKET SHEETS

James C.Gabriel Appeal Documents

1. Notice of Motion to Set Aside Judgment and Order of May 2,1973 (Dated March 4,1975),Petition of James C.Gabriel Judgment of Honorable Edward Weinfeld 3/19/75.
2. Affidavit In Opposition To M.Lauck Walton's Affidavit, Representing Alleghany Corporation et al,Who Are Opposing the I.C.C. Finance Docket #9918 MoPac "Agreed System Plan Of Reorganization" Submitted July 6,1954, Decided July 29,1954 by the I.C.C.in Washington,D.C. . .
3. Transcript of James C.Gabriel,Pro Se,March 19,1975, Plaintiff,Before Hon. Edward Weinfeld,D.J.,Appearances: James C.Gabriel,Plaintiff Pro Se,Donovan,Leisure,Newton & Irvine,Attorneys for Defendants,By M.Lauck Walton,Esq., Of Counsel.
4. Notice of Motion To Reopen The Above Case (#67 Civ. 5095 Hon.Judge E.Weinfeld)in the United States District Court, and Affidavit In Support Of Motion.
5. Affidavit by James C.Gabriel,In Opposition To Affidavit Of Roger W.Haudek,associated with Pomerantz Levy Haudek & Block,the attorneys for Robert LeVasseur.This Captioned Case is to Be Re-opened Primarily to Aid The U.S.Gov't. Internal Revenue Service From Being Defrauded Out Of Over \$100 million in Taxes(by having "B" evaluated under its Charter).
6. Affidavit in Opposition To Affidavit Of Sullivan & Cromwell. This Case is being Re-opened to Aid The U.S.Gov't. I.R.S.From Being Defrauded Out Of Over \$100 million in Taxes.
7. Judgment of Hon.E.Weinfeld,June 3,1975"Petitioner Gabriel's Motion To Re-open Is Hereby Denied," Court Finds Motion Vexatious(Trivolous Without Merit"),Orders Movant Pay \$100 Fee. . Transcript of above Motion of June 3,1975 by Gabriel

Index To The Appendix Of Appellant James C. Gabriel, Pro Se
Documents of General Relevance

Item		Pages
8	Notice of Settlement of Order and Order of Hon. Frederick van Pelt Bryan Dated October 9, 1968, as a Class Action on: That dividends declared and paid by MoPac were low, and on conspiracy.	
9	Amended Supplemental Complaint of Alleghany Corp.	
10	Amended Complaint of Orans, Elsen and Polstein	
11	Opinion of Judge Weinfeld, dated March 19, approving Settlement	
12	Opinion of Hon. E. Weinfeld on June 26, 1974	
13	Brief of Alleghany Corp., Intervenor, in support of the Application as intervenir under 20 a	
14	Opinion of Hon. Weinfeld of June 26, 1974	
15	Opinion of Hon. E. Weinfeld of March 19, 1973	
16	Settlement Agreement, December 18, 1975	
17	Order and Final Judgment May 7, 1973	

UNITED STATES DISTRICT COURT

67 CIV 5095

Jury demand date: JUDGE WEINFELD

D. C. Form No. 106 Rev.

TITLE OF CASE (CLASS ACTION)

ATTORNEYS

BETTY LEVIN, on behalf of herself and all other
holders of the Class B Common Stock of Missouri
Pacific Railroad Company, and on behalf of said
corporation & Robert LeVasseur-intervenor-9-30-68
5/7/68 Alleghany Corporation - intervenor plaintiff.
VS.

For plaintiff:

Orans, Elsen & Polstein(Attys for L
10-East-40th-Street,-NY-10016 1 Roc
LE 2-4224 PL.NY 100

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT,
T.C. DAVIS and
THOMAS F. MILBANK

Donovan, J. Leisure, Newton, & Irvine
(for Allegheny Corp) 2 Wall St. NY 10005
Changed to 30 Rockefeller Plaza NY 10020 489-4111
Levy, Hertz, Levy, Haudek & Block
(for Robert LeVasseur) 295 Madison Ave
NYC, NY 10017

LeBoeuf, Lamb, Leiby & MacRae (Attys for
One Chase Manhattan Plaza National B
NYC, NY 10005 1-24-73
(212) HA 2-6262 (Successor voting t

For defendant:

~~Leon Leighton (Miss. River Corp.)~~
6 E 15th St NYC MI 2-2361
SULLIVAN & CROMWELL
118 Wall St NYC

Dewey, Ballantine Bushby, Palmer & Wood
114 Broadway, NYC. 10005 (Mississippi
NYC, NY

Sullivan & Cromwell
(Attys for Missouri Pacific Railroad)
Robert H. Craft,
T.C. Davis and
Thomas F. Milbank

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.
J.S. 5 mailed X	Clerk	12-29-74	DRAWS	15 -
		1-5-75	STREETS	10 -
6 mailed	Marshal	1-17-75	CARROLL	5 -
		1-18-75	J. STREETS	5 -
Basis of Action: Ordered to declare and pay dividends on Class B Stock determined by Court	Docket fee	2-10-75	WELLS	5 -
	Witness fees	2-10-75	STREET	5 -
Action arose at:	Depositions	1-17-75	CARR	5 -
		2-11-75	M.T. COHEN	5 -
		2-16-75	M.T. COHEN	5 -
		2-17-75	G.E. RAYD	5 -

67 CIV 5095 BETTY LEVIN, on behalf of herself and all other, etc. VS. MISSISSIPPI RIVER CORPORATION, et al 67 CIV

DATE	PROCEEDINGS	Date of Judgment
Dec. 29-67	Filed complaint and issued summons	
Jan. 24-68	Filed Order extending time of all defts. (except T.C. Davis) to answer complaint to 2/23/68. Metzner, J.	
Jan 25-68	Filed defts' notice to take deposition of plttf. sup. issued	
Jan. 29-68	Filed Notice to take Deposition.	
Jan 29-68	Filed summons "return, service as follows: Mississippi River Corp. by Mr. Craft 1-11-68 Missouri Pacific Rd Co. by T.H. O'Leary 1-4-68 Robert H. Craft personally 1-11-68 Thomas F. Milbank personally 1-9-68	
Feb 1-68	Filed defts' (Mississippi River Corp., et ano.) affidvts. & show cause order to transfer, etc. ret. 2-13-68	
Feb 1-68	Filed defts' (Mississippi, et ano.) memorandum in support of their motion	
Feb 7-68	Filed stip. & order adjourning deposition of plttf. sine die. Cooper, J.	
Feb 9-68	Filed stip. adjourning motion filed 2-1-68 to 2-27-68 (M)	
Feb. 26-68	Filed affidavit of William E. Haudek.	
Feb. 26-68	Filed Affidavit of Sheldon H. Elsen.	
Feb. 26-68	Filed Plaintiff's Brief in opposition to motions to transfer.	
Apr. 3-68	Filed stipulation extending defts. Robert H. Craft and Thomas F. Milbank's time to answer complaint to a date 10 days following determination of a motion now pending. So ordered. Tyler, J.	
Apr. 12-68	Filed Notice of Motion re: Intervene. Ret. 4/23/68, together with affidavit in support thereof.	
Apr. 12-68	Filed Memorandum in support of motion of Alleghany Corp. for leave to intervene.	
Apr. 22-68	Filed stipulation adjourning motion now ret. 4/23/68 to 4/30/68.	
Apr 26-68	Filed defts' (Mississippi River Corp., et ano.) affidvt. in response to motion of Alleghany Corp. for leave to intervene	
Apr 26-68	Filed defts' (Mississippi River Corp., et ano.) memorandum in response to motion of Alleghany Corp. for leave to intervene	
Apr. 30-68	Filed (in court) Affidavit of Granville Whittlesey, Jr. (Reply Affidavit)	
Apr. 30-68	Filed (in court) Reply Memorandum in support of motion by Alleghany Corp. to intervene.	
May 2-68	Filed MEMO. END. on motion papers filed 4/12/68. The opposing defendants "do not categorically oppose" the movant's intervention herein, but merely suggest it be deferred for reasons which the Court finds unpersuasive. The motion is granted. So ordered. McGhee, J.	
May 7-68	Filed complaint of Intervenor Plaintiff Alleghany Corporation.	
May 8-68	Issued additional summons	
May 15-68	Filed additional summons & return, served T.C. Davis personally 5-9-68	
June. 5-68	Filed stip. & order extending time of deft. T. C. Davis to answer the complaint to a date ten (10) days following the entry of an order determining the motion by defts. Mississippi River Corp. et ano under 28 U.S.C. 1404 and Rules 12(b), 19(b), 22 and 23.1, F.R. of C.P. and that the time within all defts. are required to answer the complaint of plaintiff-intervenor is extended to a date ten (10) days following the entry of an order determining the motion by defts. Mississippi River Corp. et ano under the same rules. -- Motley, J.	
Jun. 28-68	Filed transcript of record of proceedings of 3-15-68 before Herlands, J.	
Jul. 31-68	Filed supplemental affidavit of Edward W. Keane.	
Mar. 15-68	Filed reply memorandum in support of motion to transfer, dismiss or stay the action (filed in court.)	
Mar. 15-68	Filed plaintiff's memorandum of law in response to reply brief. (filed in court.)	
Jul. 31-68	Filed affidavit of Sheldon H. Elsen.	

Continued on Page 2

6095 Betty Levin vs. Mississippi River Corp. et al

67 Cit. 5095

JUDGE WEINFELD

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Of Judgment
Jul. 31-68	Filed Opinion #35066--Defendants' motions are hereby denied in all respects.-- Herlands, J. mn	
Aug. 14-68	Filed stip & order extending time of defts to answer the complaint of Betty Levin & Alleghany Corp. to 8-26-68.---Clerk	
Aug 27-68	Filed Deft Mississippi River Corp ANSWER to Complaint	
Aug 27-68	Filed Deft Mississippi River Corp ANSWER to Pltff-Intervenor	
Aug 27-68	Filed Defts Missouri Pacific RR Co., Robert H Craft T.C. Davis & Thomas Milbank ANSWER to complaint	S&
Aug 27-68	Filed above named defts ANSWER to pltff-intervenor	"
Aug 27-68	Filed notice to take deposition of pltff intervenor	"
Sep. 9-68	Filed plaintiff's affidavit and notice of motion to maintain as class action, ret. 9-17-68	S&
Sep. 9-68	Filed plaintiff's memorandum in support of motion.	
Sep. 11-68	Filed affidavit and notice of motion of Robert LeVasseur for leave to intervene, ret. 9-24-68	S&
Sep. 11-68	Filed memorandum in support of motion to intervene.	
Sep. 17-68	Filed plaintiff's affidavit consenting to the intervention of Robert LeVasseur.	
Sep. 16-68	Filed stip. adjourning motion ret. 9-17-68 to 9-24-68.	
Sep. 20-68	Filed affidavit of Michael M. Maney in opposition to motion to intervene.	
Sep. 20-68	Filed memorandum of defts. Missouri Pacific Railroad Company et al.	
Sep. 24-68	Filed affidavit of John E. Tobin & Sheldon H. Elsen. (filed in court.)	
Sep. 24-68	Filed reply memorandum with respect to Rule 23 Motion. (filed in court.)	
Sep. 24-68	Filed memo endorsed on motion filed 9-9-68--Motion granted following argument. Settle order on 5 days notice.--Bryan, J.	
Sep. 24-68	Filed reply affidavit of William E. Haudek. (filed in court.)	
Sep. 24-68	Filed memo endorsed on motion filed 9-11-68.--Motion granted following argument. Settle order on 5 days notice.--Bryan, J.	
Sep. 30-68	Filed order of intervention that Robert LeVasseur has leave to intervene in this cause, is hereby made a party plaintiff, and may file a complaint in this cause in the same manner and with like effect as if named an original party plaintiff to this cause. The title of this action is hereby amended to read as indicated.--Bryan, J. mn	
Oct. 9-68	Filed complaint in intervention of Robert LeVasseur. (no summons issued.)	
Oct. 10-68	Filed notice of settlement and order--Ordered that this action is determined to be a class action within the provisions of Rule 23(a), (b)1 and (2), FRCP and as further indicated.--Bryan, J. mn (Consented to)	
Oct. 28-68	Filed defendant's notice of rejection and return.	
Oct. 30-68	Filed ANSWER of defts. Missouri Pacific R. R. Co. et al to complaint of Robert LeVasseur.	S&
Nov. 1-68	Filed affidavit of Michael M. Maney of service by mail.	
Nov. 1-68	Filed plaintiff's notice of rejection and return of paper entitled "Notice of Appearance and Demand."	
Nov. 6-68	Filed affidavit of Gilbert P. Strolinger.	
Nov. 7-68	Filed stip. & order extending time of deft. Mississippi River Corp. to answer the complaint to 11-22-68 and time of plaintiff LeVasseur to make any motion under FRCP 12(f) with respect to the answer of defts. Missouri Pacific Railroad Co. et al is extended to 12-2-68--MacMahon, J.	
Nov. 14-68	Filed ANSWER of deft. Mississippi River Corporation to complaint of Robert LeVasseur.	
Nov. 26-68	Filed Interrogs. propounded by pltffs. to deft. Missouri Pacific Railroad Co.	
Nov. 29-68	Filed Notice of Intention to intervene	
Dec. 11-68	Filed stip and Order time of deft. Missouri Pacific RR Co. to object to interrogs. of pltffs. be ext. from 12-5-68 to 1-6-69. Time of deft. to answer interrogs. is ext. to 2-6-69 - so ordered! Croake, J.	

Continued Page 3

JUDGE WEINFELD

DATE	PROCEEDINGS	Date On Judgment
Dec.19-68	Filed affidavit & Notice of motion of Rosalie J. Leventritt, et al to intervene as pltrf. ---ret. 1-7-69.	
Dec.19-68	Filed Memorandum of Rosalie J. Leventritt, et al in support of application for intervention.	
Dec.19-68	Filed pltrf's interrogs. to deft. Mississippi River Corp.	
Dec.27-68	Filed stip and Order - time of deft. Miss. River Corp. to file objections to interrogs. be ext. to 1-14-69 - so ordered - Frankel, J.	
Jan.3-69	Filed stip and order time of deft. Missouri Pacific to object to pltrfs. interrogs. is ext. from 1-6-69 to 2-3-69 and time of deft. to answer interrogs. is ext. from 2-6-69 to 2-21-69 = so ordered Palmieri, J.	
Jan.6-69	Filed Stip.(pltrfs. Betty Levin) the notice of motion ret. 1-7-69 be adj. to 1-14-69	
Jan.10-69	Filed Memorandum of Deft. Mississippi River Corp. and Missouri Pacific Railroad Co. in opposition to motion for leave to intervene ret. 1-14-69	
Jan.10-69	Filed Memorandum of Pltrfs in Opposition to motion for leave to Intervene	
Jan.10-69	Filed Affdvt. on behalf of pltrfs. in opposition to motion for leave to intervene ret. 1-14-69	
Jan.10-69	Filed Stip and Order time of deft. Mississippi River Corp. to file objections to interrogs. ext. to Jan. 18 and time to answer interrogs. ext. to 1-23-69. so ordered - Herlands, J.	
Jan.20-69	Filed stip and Order time of deft. Miss. River Corp. to file objections to interrogs. be ext. to 2-8-69 - so ordered - Bryan, J.	
Jan.31-69	Filed stip and Order time of deft. Miss. River Corp. to answer interrogs be ext. to 2-21-69 so ordered Bryan, J.	
Feb/6-69	Filed stip and Order - time of defts. Mississippi River Corp. and Missouri Pacific RR Co. to object to the interrogs is ext. from 2-1-69 and 2-3-69 to 2-17-69. --Weinfeld, J.	
Feb.18-69	Filed stip and Order time of defts. Missouri Pacific R.R.Co. and Mississippi River Corp. to object to interrogs. ext. from 2-17-69 to 2-21-69 --so ordered--Edelstein, J.	
Feb.26-69	Filed Memorandum of deft. Miss. Pac. RR Co. In support of objections to interrogs.	
Feb.26-69	Filed defts. Objections to interrogs. ret. 3-13-69 Room 506 10 A.M. (Notice of Motion)	
Feb.26-69	Filed Memorandum of deft. Miss. River Corp. in support of objections to interrogs.	
Feb.26-69	Filed deft. Notice of motion ret. 3-13-69 10 A.M. Room 506 to sustain objections to interrogs.	
Mar.10-69	Filed stip and Order time for deft. Missouri Pacific R.R.Co. to answer pltrfs. interrogs. is ext. from 3-3-69 to 3-10-69.--- so ordered --Cannella, J.	
Mar.11-69	Filed Defts. Mississippi River Corp. Answers to interrogs.	
Mar.11-69	Filed Defts. Missouri Pacific Answers to Interrogs.	
Mar.12-69	Filed stipulation that defts. motions (Miss. River Corp. and Missouri Pacific R.R.) ret. on 3-13-69 be adj. to 3-20-69	
Mar.19-69	Filed defts. stipulation that the motions of Miss. Riv. Corp. and Missouri Pac. R.R.Co. for orders pursuant to Rhies 30 b and 33 be adj. to 4-24-69	
Jun 13-69	Filed memo end. on motion filed Feb. 26, 1969 --motion consented to Settle order on notice --Tenney, J.	
Jun 13-69	Filed memo end. on motion filed Feb. 26-1969 -- motion consented to; settle order on notice. --Tenney, J.	

DATE	PROCEEDINGS	ASSIGNED TO WEINFELD J.	Date Order Judgment N
Jul 18-72	FILED PLTFFS. (ALLEGHANY CORPORATION) AMENDED & SUPPLEMENTAL ANSWERS TO INTERROGATORIES, SERVED ON IT BY DEFTS.		
Jul 19-72	FILED PLTFFS. (ALLEGHANY CORPORATION) AMENDED & SUPPLEMENTAL ANSWERS TO INTERROGATORIES, SERVED ON IT BY DEFTS.		
July 19 72	Filed Stip & Order that the annexed pages are substituted for, and now replace, the following pages of "Answers and Objections of Pltff Alleghany Corp. to Defts' interros," served on 1-31-72 and filed on 2-1-72. So Ordered- Weinfeld J.		
JUL 20 72	Filed Stip & Order that defts consent to the filing of the "Amended Supplemental Complaint of Intervenor Alleghany Corp." & that defts' time to answer shall be ext. to Aug 9 1972. Weinfeld J.		
JUL 20 72	Filed Amended Supplemental Complaint of Intervenor Alleghany Corporation.		
Aug 2-72	Filed Transcript of record filed dated May 26-72.		
Aug-72	Filed Stip & Order that deft's motion dated July 10-72 to compel alleghany corp. to answer certain fo defts interrogatories, dated 11-11-72 is hereby withdrawn. WEINFELD, J.		
Aug9-72	Filed Amended Complaint.		
AUG 17 72	Filed Stip & Order that defts' time to answer etc re: Amended Suppl. complaint of Intervenor Alleghany Corp. shall be ext. to Aug. 16 1972. So Ordered: Weinfeld J		
Aug.17-72	Filed stip. & order that the deposition of Alleghany by Kirby will be held be held 9-11-72 and deposition of Clifford Ramsdell adjourned to an agreed date and deposition of John Burns on 9-26-72.-- Weinfeld, J.		
Aug.17-72	Filed stip. & order extending defts' time to answer to amended complaint to 8-29-72.--Weinfeld, J.		
Aug17-72	Filed ANSWER of defts Missouri Pacific Railroad Co, Robert H. Craft, T.C.Davis and Thomas F. Milbank to Alleghany Corp's amended supplemental complaint.		
Aug18-72	Filed ANSWER of deft Mississippi River Corp. to Alleghany Corp's Amended Supplemental Complaint.		
Aug18-72	Filed affdvt of service by mail, by Luis B. Pacquing.		
Aug21-72	Filed plttf's interrogatories propounded to deft Missouri Pacific.		
Aug23-72	Filed plttf's interrogatories propounded to deft Missouri Pacific.		
Aug.24-72	Filed stip & order that deposition of the following has been adj. as indicated. So ordered. Weinfeld, J.		
Aug.28-72	Filed interrogs to deft. Missouri Pacific RR. Co.		
Aug.28-72	Filed interrogs to deft. Missouri Pacific RR. Co.		
Aug.28-72	Filed interrogs to Mississippi River Corp.		
Aug.28-72	Filed stipulation and order extending time to serve answers to interrogs. to 8/29/72. So ordered. Weinfeld, J.		
Aug.30-72	Filed ANSWER of defts. Missouri Pacific Railroad Co., Robert H. Craft, T.C.Davis and Thomas F. Milbank to Betty Levin's Amended Complaint.		S&C
Aug.30-72	Filed Missouri Pacific Railroad Co.'s Answers to Pltfs' Supplemental Interrogs.		
Aug.30-72	Filed Supplemental Answers of Pltf. Alleghany Corp. to defts' Interrogs.		
Aug.31-72	Filed Mississippi Supplemental Answers to Pltfs' Supplemental Interrogatories.		
Sep.1-72	Filed ANSWER of deft. Mississippi River Corp. to Betty Levin's Amended Complaint.		
Sept.1-72	Filed Affidavit of Service by mail of Answer to Amended Complaint. on 8/29/72.		
Sept6-72	Filed plttfs (Alleghany Corp.) Request for documents as indicated from deft. Missouri Pacific Railroad Company.		
Sep 17-72	Filed affd. vit and notice of motion of plttf Alleghany Corp. to limit depositions of Kirby & Byrnes before Weinfeld, J.		
Sept7-72	Filed Affidavit of Carol E. Neesenmann, in opposition to plttfs motion.		
pt 7-72	Filed defts memorandum in opposition to motion.		
pt7-72	Filed plttfs. memorandum in support of protective order.		

OVER.

FPI-LK-12-3-63-12M-2945

(Cont'd on pg 6)

D. C. 110 Rev. Civil Docket Continuation

Page -6-

DATE	PROCEEDINGS
Sep 7-72	Filed Memo Endorsed on Motion filed this date., Motion denied Weinfeld, J.
Sep.8-72	Filed Notice to Admit.
Sep.15-72	Filed Supplemental Interrogs. propounded by pltfs. to Missouri Pacific R.R.Co.
Sep.15-72	Filed Supplemental Interrogs. propounded by pltfs. to Mississippi River Corp.
Sep 21-72	Filed plttf-intervenor's interrogatories to T. Davis.
Sep 19,72	Filed Answers and Objections of Deft Missouri Pacific R.R.Co to Pltf's Interrogs.
Sep.19,72	Filed Answers and Objections of Deft. Missouri Pacific R.R.Co to Pltf's Interrogs.
Sep.27,72	Filed Interr. of Pltfs to Deft Missouri Pacific R.R.Co.
Sep.27,72	Filed Interrog. of Pltfs to Deft Mississippi River Corp.
Sep.27,72	Filed Interr. of Pltfs to Deft Missouri Pacific R.R.Co.
Sep.28 72	Filed Interr. of Pltfs to Defts Missouri Pacific Railroad Co. Robert H. Craft, T.C. Davis & Thomas Milbank
Oct. 5,72	Filed Pltfs' Suppl. Interrogatories.
Oct.10,72	Filed Missouri Pacific Railroad Co's Suppl. Answer to Pltfs' Suppl. Interrog.
Dec.22-72	Filed ORDER that a hearing shall be held before this Court on 1/25/73 at 10 AM in ROOM 506 of the U.S. Courthouse, for the purpose of determining whether the proposed settlement should be approved, etc.; ordered that notice of hearing shall be mailed as indicated within one week of entry of this order, by first class mail, etc., and published in The Wall Street Journal once within one week after entry of this order. Weinfeld, J. (mailed notice).
Jan.12,73	Filed Deft Missouri Pacific Railroad Co.'s Affdvt.
Jan.19,73	Filed Letter from Winchester F. Ingersoll, Jr. 381 Bway, Cambridge, Mass. 02139 to Clk of Court dated January 17,73 by certified Mail #080108, Special Delivery re: Proposed Settlement, etc. (sent to Judge Weinfeld)
Jan.23,73	Filed Memorandum of Alleghany Corp in support of Stipulation & Agreement of Settlement
Jan.23,73	Filed Affdvt of M. Lauck Walton Supporting Settlement.
Jan.23,73	Filed Memorandum of Parties in reply to objections to proposed settlement.
Jan.23,73	Filed Affdvt of John J. Burns, Jr. Supporting Settlement.
Jan.24,73	Filed Objections to Proposed Settlement.
Jan.24,73	Filed Notice of Appearance by LeBoeuf, Lamb, Leiby & MacRae; attys for Franklin M. Bank (Missouri Pacific Railroad Co)
Jan 29-73	Filed Affidavit by Edward Garfield and Barbara Garfield, Objectants.
Feb.1,73	Filed Defts' Supplemental Reply Memorandum.
Jan.30,73	Filed Affdvt of David M. Day in connection with objections of Edward Garfield and Barbara M. Garfield to proposed plan of settlement.
Jan.30,73	Filed Deft Mississippi's Memorandum in support of Proposed Settlement.
Jan.30,73	Filed Affdvt of Deft Mississippi River Corp ("Mississippi") by Everett I. Willis.
Jan.30,73	Filed Affdvt of F. Lee Jones for Deft Missouri Pacific Railroad Co. Robert H. Craft, T.C. Davis and Thomas F. Milbank.
Jan.30,73	Filed Memorandum of Defts in reply to objection to proposed settlement by Edward and Barbara M. Garfield.

See over

CLASS ACTION

67 Civ. 5095 BETTY LEVIN, ALLEGHANY CORP, AND ROBERT LeVASSEUR VS. MISSISSIPPI RIVER CORP ,
MISSOURI PACIFIC RAILROAD CO, ROBERT H. CRAFT, T.C.DAVIS AND THOMAS F. MILBA

Page-7-

Mar.19,73 Filed Affdvt of Pltffs' Counsel Sheldon H. Elsen, Abraham L. Pomerantz and John Lowenthal in support of Proposed Settlement.

Mar.19,73 Filed Affdvt of David W. Peck for Defts. Missouri Pacific Railroad Co., Robert H. Craft, T.C.I. and T.F.M.

Mar.19,73 Filed Affdvt of F.L. Lee Jones for Defts. (except Mississippi River Corp) supporting settlement

Mar.19,73 Filed Affdvt of Downing B. Jenks for Defts. Missouri Pacific Railroad Co.

Mar.19,73 Filed Affdvt of Everett I. Willis for Deft Mississippi River Corp.

Mar.19,73 Filed Defts' Joint Memorandum in response to requests of Court at 1/25/73 Hearing on proposed settlement.

Mar.19,73 Filed Pltffs Levin and LeVasseur's Memorandum in support of proposed settlement.

Mar.19,73 Filed Deft Mississippi's Memorandum in support of Proposed settlement.

Mar.19,73 Filed Memorandum of Defts Missouri Pacific RR Co, Robert H. Craft, T.C. Davis & Thomas F.M. in support of proposed settlement.

Mar.19,73 Filed Memorandum of law on behalf of Edward Garfield & Barbara M. Garfield, objectants to proposed settlement.

Mar.19,73 Filed Affdvt of F. Lee Jones for defts (except Mississippi River Corp)

Mar.19,73 Filed Defts' Suppl. Reply Memorandum.

Mar.19,73 Filed Reply Affdvt of Edward Garfield.

Mar.19,73 Filed Objections of Jacob R. Cohen and June Cohen to Approval of Proposed Settlement.

Mar.19,73 Filed Notice of Intention to object by Jacob R. Cohen & June Cohen (atty for objectors)

Mar.19,73 Filed Letter from William R. Watson to Judge Weinfeld dated 3/9/73.

Mar.19,73 Filed Pltff Alleghany Corp's Notice of Motion before Judge Weinfeld, Room 1106, 3/25/72

Mar.19,73 Filed Memorandum in support of Pltffs' motion to compel discovery.

Mar.19,73 Filed intervening pltff Alleghany Corp's Affdvt of M. Lauck Walton .

Mar.19,73 Filed " " " " " William T. Livingston.

Mar.19,73 Filed " " " " " M. Lauck Walton pursuant to Gen. Rule 9

Mar.19,73 Filed Affdvt of Gilbert P. Strelinger for Missouri Pacific Railroad Co.

Mar.19,1973 Filed Memorandum of Deft. Missouri Pacific Railroad Co in opposition to Pltffs' motion to compel discovery.

Mar. 19, 73 Filed Memorandum in reply to Deft Missouri Pacific Railroad Co's Memorandum in opposition to Pltffs' Motion to compel discovery.

Mar.19,73 Filed ~~Exposition~~ of Downing B. Jenks by Sheldon H. Elsen on 6/21 and 6/22/72. M/M

Mar.19,73 Filed Deposition of Downing B. Jenks by Sheldon H. Elsen and M. Lauck Walton on 9/20/72. M/M

Mar.19,73 Filed Appendix to Defts' Joint Memorandum.

Mar.19,73 Filed Stipulation and proposed Order of Defts (all except Mississippi River Corp)

Mar.19,73 Filed OPINI N#39329. This is a motion pursuant to Rules 23 and 23.1 of FRCP for approval of settlement agreement of a class action, as indicated, etc. Settlement is approved and judgment may be entered accordingly. Weinfeld, J.

Apr.5,73 Filed Petitioner's Notice of Motion to amend opinion & Judgment returnable 4/10/73 (Over)

- Apr. 5, 73 (Cont'd) in Room 705, 2:30 P.M. before Judge Weinfeld, Affidvt of William R. Wesson in support of Motion.
- Apr. 13, 73 Filed MEMO END. on Notice of Motion to amend opinion & Judgment dated 4/5/73. Motion is denied. All parties acknowledge that objector Wesson has a right of appeal from the ordered entered herein or the judgment to be entered thereon. Weinfeld, J. mn
- Apr. 13, 73 Filed Memorandum in opposition to motion of William R. Wesson to Amend Opinion and Judgment.
- Apr. 16, 73 Filed Letter from Michael Paul Cohen dated 4/11/73 to Clk of Court giving correct address to be reflected on docket sheet.
- May 10, 73 Filed Notice of Appeal from Denial of Motion (Mailed Copies)
- May 10, 73 Filed Notice of Appeal from Judgment (Mailed Copies)
- May 2, 73 Filed Deft. Missouri Pacific Railroad Co. Craft, T.C. Davis & Milbank Notice of Settlement before Judge Weinfeld on 4/24/73. 10:00 A.M.
- May 2, 73 Filed ORDER AND FINAL JUDGMENT. Ordered that terms and prov. of Stip of Settlement to Missouri Pacific Railroad Co and member of class are reasonable, etc.; complaint & Amended Complaint of Betty Levin, complaint & Amended Suppl Complaint of Alleghany Corp & Robert LeVasseur are dismissed as against all defts with prejudice and without costs to any party, etc as indicated. Weinfeld, J. Affidvt of Dorothy M. Strickler. ^{complaint}
- JUDGMENT ENTERED. 5/2/73. ENT. 5/17/73 mn
- May 22-73 Filed change of address of Donovan, Leisure, Newton & Irving to 30 Rockefeller Plaza, NY Tele. 489-4100.
- Jun 1-73 Filed transcript of Record of Proceedings of Jan. 25, 1972.
- Jun 6-73 Filed stipulation designating exhibits and certain documents to be transmitted to the U.S.
- Jun 6, 73 Filed Notice to Docket Clerk that record on appeal has been transmitted to USCA, 2nd Cir on 6/6/73.
- Jul 9 - 73 Filed true copy of USCA order affirming judgment of District Court on J. Weinfeld's Opinion 36012 - Judgment entered - Clerk mn
- Nov. 20-73 Filed Notice of Motion to set aside Judgment and order of May 2, 1973 returnable 11/27/73
- Nov. 23-73 Filed stip. and order adj. above motion to Dec-4-1973 -- Weinfeld, J.
- Nov. 30-73 Filed Memorandum in Opposition to Motion to set aside Judgment
- Nov. 30-73 Filed Affidavit of M. Lauck Walton in opposition to the petition of Michael Mounoudis
- Dec. 7, 1973 Filed memo end. on petitioner Michael Mounoudis's motion dated Nov. 20, 1973 setting aside order & final judgment, etc. -- Motion is denied, J. Weinfeld, J. mn

(see pg. 9)

DATE	PROCEEDINGS
Dec. 19-73	Filed stip. and order that the forms to be used for the tender offer to be made by deft. Mississippi River Corp. and for the tender to it of shares of Commons Stock of Missouri Pacific Railroad Co. as contemplated by Sections 1.2 and 1.3 of the settlement agreement dated Dec. 18, 1972 shall be substantially the forms annexed hereto as Exhibits AB and C. So ordered, Weinfeld, J. (upon the representation that the facts set forth in the attached documents are accurate and are not contrary to the terms of the order entered by this Court approving the settlement agreement.
Jan. 2-74	Filed petitioner Michael Moumouis notice of appeal to the USCA from petitioner's motion to set aside the final order and judgment entered on May 2, 1973, said motion having been argued on Dec. 4, 1973 and the denial having been entered on Dec. 7, 1973. (copies mailed).
Mar. 4-74	Filed stip. and order that the motion of Napoleon Gabriel be adj. to March 26, 1974 So ordered, Weinfeld, J.
Mar. 4-74	Filed petitioner's affdt. and notice of motion for an order modifying the order and final judgment entered May 2, 1973 approving the stip. of settlement, etc. ret. on: March 12, 1974.
Mar. 11-74	Filed memorandum of pltfs. Levin and LeVasseur in opposition to petition of Napoleon C. Gabriel to modify the final judgment herein.
Mar. 13-74	Filed brief of counsel for pltfs. Levin and LeVasseur in support of their application for allowance of fees and expenses.
Mar. 13-74	Filed pltfs. Levin and LeVasseur affdt. and notice of motion for an order directing defts. Missouri Pacific RR Co. and Mississippi River Corp. to pay applicants Orans, Elsen and Postein and Pomerantz Levy and Block and Haudek the sum of \$2,000,000 as legal fees and the sum of \$22,422.06 for their disbursements ret. on: March 26, 1974.
Mar. 13-74	Filed memorandum in support of the application of pltf. Alleghany Corp. for fees and expenses.
Mar. 13-74	Filed pltfs. Alleghany Corp. affdt. and notice of motion for allowance and award to said pltf. of counsel fees and expenses incurred ret. on: March 26, 1974.
Mar. 20-74	Filed memorandum of corporate defts. in answer to fee applications of pltf. Alleghany Corp. and attys. for pltfs. Levin and LeVasseur.
Mar. 22-74	Filed Napoleon C. Gabriel supplemental petition.
Apr. 8-74	Filed memo end. on petitioner's motion dated March 6, 1974 for an order modifying the order and final judgment dated and entered May 2, 1973---This motion is without merit, etc. as indicated. Weinfeld, J. m/n
Jun 18-74	Filed petitioner's notice of appeal to the USCA from the final order dated April 8, 1974 which denied appellants motion to amend its judgment so as to make said judgment not binding on appellant and others similarly situated. (copies mailed).
Jun 26-74	Filed OPINION#40870--Pltf. Alleghany's application for reimbursement in the sum of \$850,000 is granted. The court deems \$1,750,000 as fair and reasonable to the attys. for the pltfs. Levin and LeVASSERU. These couns. are also entitled to reimbursement for disbursements in the sum of \$22,422.06. Judgment may be entered accordingly. Weinfeld, J. m/n

(M 2-10)

DATE	PROCEEDINGS
Jul 3-74	Filed JUDGMENT # 74,567 --ORDERED that the defts. Mississippi River Corp. and Missouri Pacific RR Co. pay the sum of \$850,000 for legal fees and disbursements to ptlf. Alleghany Corp., to be paid in equal parts by such corp.; Ordered that the defts. Mississippi River Corp. and Missouri Pacific RR Co. pay the sum of \$1,750,000 as legal fees and the sum of \$22,422.06 as disbursements for a total of \$1,772,422.06 jointly to Messrs. Orans, Elsen and Polstein and Pomerantz Levey, Haudek & Block to be pd. in equal parts by such corp. Weinfeld, J. m/n Judgment entered, Clerk. entered on docket 7/9/74.
Jul 23-74	Filed Notice of Appeal for Petitioner, to U.S.C.A. from the final judgment of 7/3/74
Aug. 1-74	Filed appellants Jacob Cohen and June Cohen notice of appeal to the USCA from the judgment requiring debt. Missouri Pacific RR to pay legal fees and disbursements to pltt. Alleghany Corp. entered on July 3, 1974. (copies mailed).
Aug. 1-74	Filed bond on undertaking for costs on appeal in the amt. of \$250.00 by the Fidelity and Deposit of Maryland.
Aug. 1-74	Filed ptlf. Betty Levin affdt. of Sheldon Elsen in support of an objection to statement of the evidence under rule (10 c) FRAP.
Sep. 23-74	Filed notice that the original record on appeal has been certified and transmitted to the USCA.
8-6-74	Filed Transcript of Record of Proceedings, dated 3-26-74
01-22-75	Filed motion of Michael P. Cohan and June Cohen for an order vacating bill of costs of alleghany corp. (on Submission of papers)
01-22-75	Filed true copy of USCA order affirming D.C. orders with costs taxed against the appellants. Docketed as a judgment # 75,077 on 1-22-75- m/n (costs \$1,919.32 against Alleghany Corp. and \$146.02 against Betty Levin and Robert Levasseur)
12-31-74	Filed true copy of U.S.C.A. order affirming D.C. order with costs to be taxed against the appellants. Judgment entered 1-10-75 Clerk m/m
2-10-75	<i>Issued Execution on judgment of 75,077, in the sum of \$1,919.32.</i>
03-05-75	Filed petitioner's notice of motion re: set aside judgment and order of 5-2-73, retc. 3-18-75.
03-14-75	Filed affidavit of M.L. Walton in opposition to motion of James C. Gabriel to set aside this court's judgment of 5-2-73.
03-17-75	Filed Memorandum of defts. respondents in opposition to motion to set aside judgment.
03-29-75	Filed affdt. in opposition to affidavit of M. Lauck Walton Esq. representing Alleghany Corp.
03-21-75	Filed Memo. endorsed on motion filed 3-5-75. Petitioners motion is denied So order Weinfeld, J. m/n
04-11-75	Filed J. C. Gabriel Petitioner notice of appeal to USCA Second Circuit from final judgment of Dist. Court entered on 3-21-75 and appeals each and every prior order and decision. (pro-se petitioner) mailed copies to Orans, Elsen & Polstein, Donovan Leisure Newton & Irvine Pomerantz Levy Haudek & Block, Dewey, Ballantine, Bushby, Sullivan & Cromwell and Gerard M. Carey.
04-16-75	Filed Transcript of record of proceedings, dated March 19, 1975
04-18-75	Filed satisfaction of Judgment # 74,567
04-22-75	Filed satisfaction of judgment #74,567
05-19-75	Filed ptlf's affdvt. and notice of motion to re-open proceedings, ret. on June 3, 1975.
05-6-75	Filed Creditor notice of taking deposition of Napoleon C. Gabriel on 5-29-75 and request for documents. and subp. iss.
05-06-75	Filed Judg. Creditor notice of taking deposition of Michael Haudek on 5-29-75 and request for documents. and subp. iss.
05-20-75	Filed supplemental record of notice on appeal has been certified and transmitted to the U.S.C.A. for Second Circuit on 5-20-75.

DATE	PROCEEDINGS
5-28-75	Filed pltf. affdvt. in opposition to motion of James C. Gabriel to re-open case
05-29-75	Filed Judg. Creditor Alleghany Corp. affdvt. and notice of motion for and order pursuant to rule 37 compelling ret. 6-3-75.
05-29-75	Filed memorandum in support of above motion in support of Judg. Creditor Alleghany Corp. motion to compel discovery of judgment debtors mounousis and Gabriel
05-30-75	Filed defts. Missouri Pacific Railroad Co. et. al affdvt. in opposition to motion of James C. Gabriel for an order reopening this case
05-30-75	Filed memorandu of law in support of above affdvt. in opposition to motion to re-open the judgment
06-03-75	Filed AFFDVT. of James C. Gabriel in opposition of the affdvt. of Roger LeVasseur.
06-03-75	Filed affdvt. of James C. Gabriel in opposition to affdvt. of Marcia B. Paul.
06-05-75	Filed memo end. on petitioner James Gabriel motion dated May 19, 1975 to reopen-- By Petitioner Gabriels motion to reopen is denied. Court finds motion vexatious and orders movant to pay \$100.00 counsel fee to be divided among opposing counsel. So ordered, Weinfeld- J. mn

United States District Court
Southern District of New York

MEMO. ENDORSED

Betty Levin, Alleghany Corporation
and Robert LeVasseur,

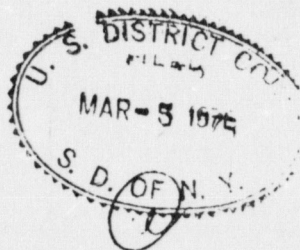
Plaintiffs,

-against-

Mississippi River Corporation,
Missouri Pacific Railroad Company,
Robert H. Craft, T.C. Davis and
Thomas F. Milbank,

Defendants.

67 Civ. 5095 (EW)
: Notice Of Motion To Set
: Aside Judgment and Order of
: May 2nd, 1973



Sir:

PLEASE TAKE NOTICE, that the undersigned Petitioner James C. Gabriel, appearing Pro Se, will move this honorable Court of Justice at the Courthouse, Foley Square, New York, New York, in Room 2204 thereof on the 18 day of March 1975 at 2:15 P.M. o'clock or as soon thereafter as Petitioner Pro Se may be heard, before the Honorable Edward Weinfeld, U.S.D.J., for an order (a) setting aside the Order and Final Judgment dated and entered May 2, 1973 approving the Stipulation of Settlement of the above captioned case and the Recapitalization Plan of MoPac, and (b) either reinstating the above captioned suit for better dividends and conspiracy as ordered by Honorable Frederick van Pelt Bryan U.S.D.J., dated New York, New York October 9, 1968, or dismissing the said suit, or evaluating Petitioner's Class B Missouri Pacific Railroad equity bearing Common Stock under due process of law to find the real value of Class B and give Class B value for value according to the U.S. Constitution and laws of the U.S. and according to the MoPac "Agreed System Plan" of Reorganization of 1954-1955, Finance Docket #9918, as approved by the Interstate Commerce Commission in 1954, which certified it to the U.S. Federal District Court in Saint Louis, and the District Court in turn approved and certified it to the I.C.C. in Washington, D.C. in 1955, thus making the I.C.C. MoPac "Agreed System Plan" of Reorganization a law of the United States of America, and (c) that this hon. Court has no jurisdiction over the petitioner in light of Zahn v. International Paper Company, U.S. Sup. Ct. decided December 17, 1973, and (d) granting such other further relief as to this honorable Court seems just and proper, for reasons set forth in annexed petition.

Dated: March 4, 1975
P.O. address
P.O. Box 94
Sea Girt, New Jersey 08750
(201) 899-6200

Yours, etc.,
James C. Gabriel, Pro Se,
Petitioner.

24) As of December 31, 1972, MoPac had a retained net income of \$349,192,000. Since MoPac's retained income is in addition to assets sufficient to satisfy fully all liabilities of MoPac, including the

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

67 CIV. 5095 (E.W.)

BETTY LEVIN, ALLEGHANY CORPORATION
and ROBERT LE VASSEUR,

Plaintiffs.

vs.

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT, T.C. DAVIS and
THOMAS F. MILBANK,

Defendants.

PETITION

JAMES C. GABRIEL, being duly sworn, petitions this Court and deposes
and states as follows:

1. That his Post Office address is **P.O.Box 94, Sea Girt, N.J. 08750**
2. That he is the registered owner in his name of One Hundred Twenty
(120) shares of Missouri Pacific Railroad Company, Class B, common equity
bearing stock.

3. That this Honorable Court of Justice in its order and final judgment
dated and entered May 2, 1973, retained jurisdiction of all matters respecting
the consummation of the settlement of this action pursuant to the Stipulation
of Settlement and for the purposes of entertaining applications for attorney's
fees and expenses by counsel for plaintiffs Betty Levin and Robert LeVasseur
and by plaintiff Alleghany Corporation".

RELIEF SOUGHT

4. Petitioner respectfully requests, in the interest of justice, and on
newly acquired information not made available to the Court prior to this time,
showing that the interests of the plaintiff Alleghany Corporation as being in
direct opposition to those of the petitioner, James C. Gabriel, and the interests
of the United States Government, the following:

(a) The setting aside this Order and Final Judgment dated and en-
tered May 2, 1973, approving the Stipulation of Settlement and the effects of
all subsequent acts of the parties to implement the same and

(b) either reinstating the above captioned suit or dismissing the
said suit, or modify the said suit by evaluating the Class B equity bearing com-

mon stock according to the Missouri Pacific Railroad "agreed system plan of reorganization" by the Interstate Commerce Commission - Finance Docket #9913, Missouri Pacific Railroad Company Reorganization, the "Agreed System Plan of Reorganization" having become a law of the United States by having the Reorganization Plan confirmed and certified both by the Interstate Commerce Commission in Washington D.C. and by the Federal District Court in ~~St. Louis~~ ^{Saint} Louis in 1954 - 1955 so that the equivalent values of Class B will be arrived at under the U. S. Constitution.

REASON FOR RELIEF SOUGHT

Alleghany's interest in the settlement was self-interest, not representative of and in opposition to that of Petitioner, Class B stockholder and in opposition to the interests of the United States Government.

5. This Honorable Court in its opinion on Page 32 stated: "Alleghanys self interest as the owner of 53% of the Class B stock gives assurance that it negotiated to obtain the best possible terms for that group viza viz the Class A stockholders". The Court also on Page 31 stated that the joint recommendation of the class representatives were "entitled to substantial weight."

It is thus clear that this Court was unaware, as was the petitioner, that Alleghany's self-interest in disposing of its Class B common stock was paramount and was not representative or beneficial to the petitioner, Class B stockholder, or to the United States Government. Alleghany wanted to become a motor carrier and be under the jurisdiction of the I.C.C. so as to save 70% yearly in Internal Revenue Service taxes. On September 4, 1963, Alleghany bought Jones Motor Co., Inc., a motor carrier subject to I.C.C. regulation. See Exhibit #6, Pages 3633.

6. The Interstate Commerce Commission decided on January 27, 1970, to authorize Alleghany to acquire Jones Motor Company, Inc. and the transaction was consummated on April 30, 1970. See #MGF-10444, Alleghany Corporation control and purchase Jones Motor Co., Inc. and control Erie Trucking Company, Exhibit #3.

The Interstate Commerce Commission conditioned its approval for Alleghany's purchase of Jones Motor so as to have Alleghany become a motor carrier under the I.C.C. jurisdiction and lessen its tax burden from being subjected to a 70% penalty tax on the "undistributed personal holding income" (see Page 339, Exhibit #3) as follows: "Still further, in accordance with Alleghany's suggestion, and our own independent evaluation of the situation, we shall require as a condition for consummation of the proposal that the trusteeship of Alleghany's MoPac securities, as previously ordered by the commission, be continued subject to the continuing jurisdiction of the commission. The commission in the future may either in response to a petition or on its own motion institute an investigation to determine whether the trust should be continued or whether Alleghany's divestiture of MoPac securities should be required." See Exhibit #3, Page 350/MC-F10444.

7. "One of the primary reasons presented by Alleghany for acquisition of the operating rights of Jones is to lessen its tax burden. Such burden arises from the fact that Allan P. Kirby, as of February 28, 1969, was a beneficial owner of 4,034,813 shares or 56.2% of the outstanding common stock of Alleghany. Alleghany is, therefore, for Federal Income Tax purposes, considered a personal holding company since one person (less than 5 individuals) owns more than 50 percent of its stock and has "personal holding income," (60% or more of adjusted gross income consists of dividends and interest) and is therefore subject to a 70 percent penalty tax on the undistributed personal holding income." Alleghany does not want to distribute all such income to avoid the tax. With Alleghany the recipient of the operating revenues generated by its Jones Motor Division, it alleges it would be an operating company rather than a holding company for federal tax purposes. It could then retain and reinvest net earnings and would not be subject to the 70% penalty tax". See Exhibit #3, Page 339, #MCF-10444.

8. After the I.C.C. hearings before Hon. Judge Gibbon in Washington, D.C. on September 17 to and including the 21, 1973, regarding the "Plan of Recapitalization" - Finance Docket #27346, Missouri Pacific Railroad Co., securities decided December 6, 1973, Service date December 14, 1973, authority granted to MoPac to issue new securities by Division 3 Commissioners Tuggle,

Denson and MacFarland, Allegheny Attorney M. Lauck Walton, Esquire, filed a Brief with the I.C.C. in October of 1973 in reference to an application seeking the I.C.C.'s approval of the recapitalization of MoPac as per settlement agreement and as per judgment of this court on May 2, 1973, in the instant case. Petitioner Gabriel attaches a copy of Pages 9 and 10 of said brief (Exhibit #2) wherein Allegheny requests that "The divestiture of Allegheny's holdings in MoPac (Class B) pursuant to the Plan of Reorganization, would also promote the public interest" that "In a prior proceeding before the Commission Allegheny's acquisition of the Jones Motor Company, Inc., a common carrier by motor vehicles was approved. Allegheny Corporation Control and Purchase Jones Motor Co., Inc. and control Erie Trucking Company, #MC-F-10444, 109 MCC 333, decided January 27, 1970.

"The Commission, as a condition to its authorization, ordered that the trusteeship of Allegheny's MoPac securities be continued. The Commission noted "...either in response to a petition or on its own motion (it may) institute an investigation to determine whether the trust should be continued or whether Allegheny's divestiture of MoPac securities should be required". Allegheny Corporation - Control and Purchase - Jones Motor Co., Inc. and Control Erie Trucking Company, supra, at 350.

"Undoubtedly the Commission, in so ordering, weighed the unique characteristics of MoPac Class B stock understanding the absence of a broad and liquid market for that security (See Exhibit #2, Testimony of F. L. Lee Jones). The Commission was undoubtedly aware that the sale of Allegheny's B shares in the usual way was simply impossible and to so order would cause great financial injury to Allegheny as well as to the minority Class B stockholders, the price of whose stock would be substantially depressed by the forced sale of the controlling stock of B shares.

"Furthermore, it is clearly conducive to the public interest that the Commission be relieved of the obligation of overseeing this trust, while at the same time of achieving a solution which will not harm Allegheny which also is a carrier subject to the Commission's jurisdiction."

"Clearly, an excellent procedure for eliminating or virtually eliminating Alleghany's ownership of MoPac B stock is that embodied in the Plan of Reorganization (Recapitalization)."

From all of the above it can readily be seen that the ICC petitioned Alleghany to divest itself of its MoPac Class B stock, Mississippi River Corp was the natural recipient buyer, at a low value of \$2450 per Class B, in order that Alleghany Corporation be a common carrier by Motor Vehicle and save itself from being subject to an annual 70 percent penalty tax and continue to be a common carrier by motor vehicle under the jurisdiction of the I.C.C. On Page 350 of 109 M.C.C. the I.C.C. requires Alleghany as a condition for "consummation of the proposal" to have Alleghany become a common carrier by motor vehicle, that Alleghany divest itself or sell out its MoPac Class B, as follows:

350 MOTOR CARRIER CASES. INTERSTATE COMMERCE COMMISSION
~~Still~~ further, in accordance with Alleghany's suggestion, and our own independent evaluation of the situation, we shall require as a condition for consummation of the proposal that the trusteeship of Alleghany's MoPac securities, as previously ordered by the Commission, be continued subject to the continuing jurisdiction of the Commission. The Commission in the future may either in response to a petition or on its own motion institute an investigation to determine whether the trust should be continued or whether Alleghany's divestiture of MoPac securities should be required.

The reason why Alleghany Corp. wanted to continue to be a common carrier by Motor Vehicle was to save itself from being subject annually to a 70 percent penalty tax on the "undistributed personal holding income." On Page 339 of 109

M.C.C. the I.C.C. has written this as follows:

ALLEGHANY CORPORATION-CONTROL AND PURCHASE 339

One of the primary reasons presented by Alleghany for acquisition of the operating rights of Jones is to lessen its tax burden. Such burden arises from the fact that Allan P. Kirby, as of February 28, 1969, was the beneficial owner of 4,084,813 shares, or 56.21 percent of the outstanding common stock of Alleghany. Alleghany is, therefore, for Federal income tax purposes, considered a personal holding company since one person (less than 5 individuals) owns more than 50 percent of its stock and has "personal holding income," (60 percent or more of adjusted gross income consists of dividends and interest) and is therefore subject to a 70-percent penalty tax on the "undistributed personal holding income." Alleghany does not want to distribute all such income to avoid the tax. With Alleghany the recipient of the operating revenue generated by its Jones Motor Division, it alleges it would be an operating company rather than a holding company for Federal tax purposes. It could then retain and reinvest net earnings and would not be subject to the 70-percent penalty tax.

9. It is submitted that Allegheny's part as a class representative for petitioners and for the other MoPac Class B stockholders was to represent the interests of the Class B stockholders and not to represent its own selfish interests in order to become a common carrier by motor vehicle in order to save itself annually from a 70 percent penalty tax only by being under the jurisdiction of the Interstate Commerce Commission as a motor carrier, nor was Allegheny's role to represent the interests of the I.C.C. in any manner, shape or form.

10. Petitioner Class B stockholder was not benefited by the settlement or by the Plan of Recapitalization but was harmed in the integrity and his rights to his property and at the same time exposed to confiscatory taxation in that the cash payment of \$850.00 per share is to be treated as ordinary income of 70% whereas the tax to Allegheny would be about 15%.

11. This settlement and Plan of Recapitalization of Petitioner's equity in regards to the \$349,192,000.00 retained income as of December 31, 1972, that belongs to the Class B and this retained income ^{is} in relation to the Class A preferred stock of 5% interest to be paid when and if earned and declared with a liquidating value of \$100 per class A consisting of about 1,865,000 shares of Class A or a total value of \$186,500,000.00 for all the Class A reduces my Class B equity from about 65 percent to about 25 percent and at the same time increases the equity of Class A from about 35 percent to about 75 percent (see my exhibit on equity #5). This equity just mentioned is only in relation to the \$359,192,000 Class B retained income versus \$186,500,000 for Class B's partner or the Class A, but it does not include the \$545,000,000 in consolidated non-depreciable properties, including land and land rights at December 31, 1972, and 1971, that belongs to Class B equity and property bearing common stock, according to the Interstate Commerce Commissions MoPac "agreed system plan of reorganization of 1954-1955. \$545,000,000.00 property values added to \$349,000,000.00 retained income amounts to \$894,000,000.00, which when divided by 39,731 shares of Class B amounts to \$22,500.00 per Class B.

In conclusion from the above facts Allegheny could not and should not have been representative in the Class suit, and in the "Settlement Agreement" because Allegheny's self interest as the result of its purchase of Jones Motor Company and the Order of the I.C.C. in 1970 in order to save on its federal

income taxes

forbids such representation in a class action suit.

12. The settlement and Recapitalization benefit Alleghany but not the represented Class B stockholders of which petitioner is one. Nor did it benefit the United States Government which had a great stake in the proper evaluation of the Class B under due process of law to find its true higher value so that the United States Government could collect more capital gains taxes from the higher purchase price that Mississippi River Fuel Corp. would have to pay for Alleghany Class B.

If Alleghany had dropped the suit Petitioner and other Class B stockholders would have been better off financially.

B) Due to the I.C.C. Order of 1970, Alleghany was no longer the real party in interest to continue the suit, nor to settle the suit. Alleghany's Class B MoPac stock was in trust under the continuous jurisdiction of the I.C.C. (See Exhibit #3, Page 39) that required the approval of the I.C.C. to continue the litigation and no such approval was given by the I.C.C. in addition to the fact that the I.C.C. could at any time petition Alleghany to divest or sell their MoPac Class B stock. (See exhibit 3, Page 350).

14. Because of the facts as stated in (13) supra the Court lacked the jurisdiction and adjudicatory power to continue and/or settle the suit.

15. The settlement agreement served Alleghany but not Class B stockholders because Alleghany had a tax shelter as a motor carrier but not the Petitioner and other Class B stockholders, so Alleghany's interests were very diverse from Petitioner and other holder's of MoPac Class B, and also diverse from the interests of the United States Government which was being short-changed or cheated out of a higher valuation and so higher taxes.

16. Alleghany should have disclosed its above special interests in its settlement to the court and to the Class B stockholders in the proxy statement. By not doing so Alleghany misled the court and the Class B stockholders so that they were misled into false satisfaction.

17. The settlement agreement and the Plan of Recapitalization is unconstitutional and against the Fifth Amendment because it is taking away Petitioner's property without evaluation to find its true value under due process of

law, and it is contrary to Rule 23 of FRCP, all for the benefit of Allegany and for the benefit of the I.C.C. It is against Article 1, Sections 9 and 10, the Fifth Amendment and the 14th Amendment, Section 1. It is also against the equity and property values given to the equity bearing Class B in the I.C.C.'s Plan of Reorganization of 1954 - 1955 - called the "Agreed System Plan of Reorganization," wherein Class B is made "the residuary beneficiary of any future prosperity the property may enjoy." For that reason, the Federal District Court and the I.C.C. have a duty according to the law - which is the MoPac agreed system of Reorganization of 1954-1955-to enforce that law and evaluate Class B accordingly.

18. The Court's settlement under Rule 23 of FRCP so interprets this rule of procedure as if the rule created substantive rights, a situation beyond the constitutional power of a Federal Court.

19. This Honorable Court must in all fairness stop this unfair taking away of Petitioner's property rights in his Class B equity bearing common stock and that of other Class B stockholders. In all fairness, it must see to it that Class B must be evaluated under due process of law to give Class B its real value by following the law of the "agreed system Plan" and the constitution of the United States, mainly for the benefit of the Class B stockholders, but also for the benefit of the United States Government which has a great stake in seeing that Class B is given its true value so that the United States Government may collect its rightful capital gains taxes.

20. Evaluating the Class B stock was never purported, nor could it be attempted to be attained in the settlement hearings. The figure of \$2,450 per share was as this honorable Court stated, for settlement purposes only. There is a grave question as to the true value of the Class B stock. In Petitioner's brief submitted to the I.C.C. at its hearing on the Plan of Recapitalization R.D. 27346, September 17 to and including the 21st, 1973, at Washington, D.C., petitioner stated that the true value of the Class B as of December 31, 1972, was \$349,192,000.00 retained income plus \$545,000,000.00 property and land rights or \$894,000,000.00 value, which when divided by 39,731 Class B equals \$22,500 per share of Class B value.

21. The figure of \$2,450 per Class B value was, as this honorable Court stated, for "settlement purposes" only. Accordingly, the court does not come out with the true value of Class B. Petitioner claims, as the true value of Class B, an average value of \$22,500 per share as of December 31, 1972. The difference between \$2,450 and \$22,500 is a difference of \$20,050.

ADDITIONAL REASONS FOR RELIEF SOUGHT

22. The United States Government is being short changed in regards to capital gains taxes for many millions of dollars by this settlement of \$2,450 given to Class B per share for settlement purposes instead of the value of \$22,500 per Class B as petitioner has shown to be Class B's value because Class B MoPac common has not been evaluated under due process of law to find Class B's real value - equivalent value under the Constitution of the United States. Being that Alleghany's interest in the "Settlement" was self interest in order to get under the jurisdiction of the I.C.C. as a motor carrier in order to save yearly in Federal Income Penalty Taxes, Alleghany was not representative of the Class B stockholders interests but was under I.C.C. pressure to divest itself of MoPac Class B shares. I blame the I.C.C. for not evaluating Class B to find its true value, especially Division 3, of Commissioners Tuggle, Deason and MacFarland because the I.C.C. has the expertise to do this evaluation. Furthermore, the I.C.C.'s MoPac "Agreed System Plan of Reorganization" was not followed or obeyed by the I.C.C. as a law of the United States that the I.C.C. made it in 1954-1955 when the Reorganization Plan was approved and certified both by the I.C.C. and the United States District Court in St. Louis, in 1954-1955.

Mississippi River Corp. was charged only \$2,450 per Class B for the 20,000 or more shares of Class B that Alleghany sold to Mississippi in this Plan of Recapitalization. This was about \$20,000 per Class B less than Class B was valued at considering the retained income of \$349,192,000 belonging to Class B, in addition there is \$545,000,000 in property and land and land rights values that also belong to Class B as of Dec. 31, 1972 or a total of \$894,000,000 values for the 39,731 shares of Class B. 20,000 shares of Class B were sold to Mississippi at \$20,000 per share less than Class B was worth, which amounts to approximately \$400,000,000 in value that Mississippi benefited by this Class B bargain that Alleghany Corp. sold to Mississippi all because Alleghany was obliged under I.C.C. pressure to divest itself of this Class B MoPac common stock in order to remain as a motor carrier under

the jurisdiction of the J.C.C. in order to save millions of dollars in taxes yearly as petitioner has shown, as above Mississippi therefore underpaid for s Class B common stock over \$400,000,000. The capital gains that would have been paid on this \$400,000,000 to the Federal Government are enormous. Now this Honorable Court must order to have Class B evaluated under due process of law by following the "Agreed System Plan of Reorganization" which is a law of the United States. The Honorable Court must follow the Constitution of the United States.

23. Petitioner submits exhibits of the Interstate Commerce Commission Finance Docket #9918 of the Missouri Pacific Railroad Company Reorganization in order to verify the MoPac "Agreed System Plan of Reorganization" by the Interstate Commerce Commission, as follows:

MISSOURI PACIFIC RAILROAD COMPANY REORGANIZATION

Submitted July 6, 1954. Decided July 29, 1954.

Upon supplemental record made at reopened hearings held pursuant to the provisions of paragraph (b) of section 208, title 11, U. S. Code, and section 77, of the Bankruptcy Act, as amended, plan of reorganization for the Missouri Pacific Railroad Company, and others, debtors, modified and approved.

Appearances as in prior reports and, in addition, *Arthur Arsham, Harold Brown, Walter H. Brown, Jr., Carl B. Callaway, Allan F. Campbell, Joseph A. Doyle, Felix A. Fishman, Edward L. Friedman, Jr., Emanuel Gruss, Edward J. Hickey, Jr., John P. Humes, Percival E. Jackson, Jerome M. Kirschbaum, Ferdinand H. Kolvaard, Alan S. Kutler, Frederick M. Myers, Jr., Elton S. Olson, William P. Palmer, David M. Potts, Thomas J. Sheehan, Jr., John Ben Sheppard, Alfonso E. Solinas, Harry L. Stinson, Alfred B. Teton, Jay W. Tracey, Jr., and Lyonel E. Zanz.*

SEVENTH SUPPLEMENTAL REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed to the report proposed by members of the staff of our Bureau of Finance. Thereafter, the bankruptcy trustee, acting pursuant to authorization and direction of the United States district court of jurisdiction in these proceedings, filed with us a petition accompanied by a stipulation and agreement, executed by a majority of the parties in interest, embracing certain modifications of the proposed report recommendations, which, if adopted, would be acceptable to the parties signatory to the stipulation and agreement as an agreed system plan. Our conclusions differ somewhat from those contained in the proposed report.

Request for oral argument on exceptions was made by the independent directors of the Missouri Pacific Railroad Company, debtor. Similar requests made by the Alleghany Corporation, owner of approximately 49 percent of Missouri Pacific common stock, and Oscar Gruss & Son, holders of International-Great Northern Railroad Company adjustment-mortgage bonds, were later withdrawn, with the res-

¹ For previous reports see 239 I. C. C. 7; 240 I. C. C. 15; 257 I. C. C. 470 and 745; 275 I. C. C. 49 and 203; and 282 I. C. C. 629.
290 I. C. C.

310385-65--No. 20--1

477

492 INTERSTATE COMMERCE COMMISSION REPORTS

date, on 30 days' notice, at their principal amount plus all interest due and payable thereon.

(b) *New equity issues.*—In lieu of the issue of a \$100 par-value

(c) *Class A common stock.*—Dividends on this class of new common stock would be limited to either \$5 or \$4 per share in a calendar year, as the Commission shall determine, irrespective of what amounts may have been paid on class B common stock. Dividends on class A stock would be noncumulative, and none would be paid in the form of stock or notes in any form other than cash or its equivalent. Class A stock would be nonconvertible, and in the event of dissolution, winding up, or liquidation of the company, the holders of this class of stock would be entitled to receive out of the assets of the company \$100 per share before a distribution is made to holders of class B stock, who thereafter would be entitled to any further distributions out of the assets of the company, without further participation by holders of class A stock.

(d) *Class B common stock.*—This class of new common stock, having a total stated value of \$1,065,717, would be issued only to holders of Missouri Pacific common stock on a basis of 1 share of new, of a stated value of \$100 per share, for each 20 shares of old stock, or, in the alternative, in the discretion of the Commission, 1 share of new, of a stated value of \$50 per share, for each 10 shares of old stock.

No dividends could be declared on class B common stock in any calendar year unless, during that year, dividends of \$5 or \$4 (whichever is prescribed by the Commission) have been paid or set apart for payment on the class A common stock; but there would be no other restriction on amount of dividends which may be declared and paid on the class B stock.

feature of the latter is not necessary for compensation in full. Similarly, the rights of the class A stockholders upon liquidation should be limited to \$100 per share, eliminating the liquidation participation provided for this stock in the 1919 plan. We find that the above-described distribution to the old preferred-stock holders of new non-cumulative nonconvertible no-par value class A stock entitled to \$5 dividends annually, and to receive upon liquidation \$100 per share out of the assets of the reorganized company, would be fair and equitable and would compensate them fully for the rights surrendered.

290 I. C. C.

50 INTERSTATE COMMERCE COMMISSION REPORTS

Modification of the class A stock.—Under the agreed plan, the class A stock would be noncumulative and nonconvertible and dividends would be limited to \$1 or \$5 per year as we may decide, without further participation in earnings. We herein have concluded in our discussion of the treatment of the old preferred-stock holders that a dividend rate of \$5 was necessary to compensate them for their rights. We also concluded that we should approve the elimination

The groups contend that the provision of the agreed plan eliminating the new preferred stock places control of the new company in the new class A stock although the fact that such stock is noncumulative and nonconvertible would result in entire loss of income by the holders in years of low earnings and a resulting low market price for the stock. Such a type of voting security, they assert, would not promote the selection of the best, or a stable management, and they point out that the holders of the new first-mortgage bonds would be vitally interested in a stable and capable management. Considering the estimates of earnings upon which the examiners based their recommendations, we do not attach material significance to this criticism. We believe it impossible to reorganize the debtors in a manner equitable to all classes of security holders under a plan which would assure the new stockholders of a return in every year. This objection to the agreed plan is not sustained.

In accordance with our hereinbefore-stated findings, we conclude that the 1919 plan provision for class A common stock should be modified so that the annual dividends would be limited to \$5 in any year, without further participation in earnings in the same year. Provision for this stock should be further modified so that upon dissolution, winding up, or liquidation of the new company, it would be entitled to receive out of the assets of the company only \$100 per share, such distribution to be prior to any distribution to the class B stockholders. The limitation upon the issue of additional stock or the change of the rights of stockholders should be modified to conform to the agreed plan.

Modification of the class B common stock.—Under the plan recommended by the examiners, no class B common stock would have been

290 I. C. C.

MISSOURI PAC. R. CO. REORGANIZATION

599

issued until the exercise of warrants, under prescribed conditions, by the old common-stock holders of Missouri Pacific. Under the agreed plan there would be 40,657.17 shares of no-par-value class B stock of \$100 stated value, or, in our discretion, 81,314.34 shares of a stated value of \$50 per share, all to be issued to the Missouri Pacific common-stock holders on the basis of 1 share for 20 old shares, or if \$50 stock is issued, 1 share for each 10 shares of the old stock. There would be no other limitation upon the dividends which might be declared and paid on this stock.

We conclude that we should approve modification of the class B stock provided for in the 1919 plan to conform to the agreed plan, using \$100 stated value stock and distributing to the old Missouri Pacific common-stock holders 1 share of new class B stock for each 20 shares of old stock. We find that such treatment would be fair and equitable.

²⁰ On the basis of the record before us, Alleghany Corporation would receive 1 share for each 20 shares of its holdings of 390,000 shares, or 19,500 shares.

290 I. C. C.

provisions of section (c) of section 77 of the Bankruptcy Act, as amended, and of section 208 (b).

We conclude and find that, upon the record previously made in this proceeding and as supplemented by further hearings held pursuant to the provisions of section 208, the 1949 plan of reorganization should be modified in accordance with the findings and conclusions set forth in this report, and that as thus modified the plan will be fair and equitable and in the public interest and compatible with the provisions of section 208, title 11, U. S. Code, and of section 77 of the Bankruptcy Act. The plan so modified is hereby approved and will be certified to the United States District Court for its approval.

An appropriate supplemental order will be issued.

MAHAFFIT, Commissioner, concurring in the result:

Another serious defect is the proposed "B" stock. This is intended to give recognition to the old common. That common has, at most, only a nuisance value if the claims prior to it are to be fully met. It is proposed to award to it only a small amount in actual par value but

200 I. C. C.

MISS I. PAC. R. CO. REORGANIZATION

625

to make it the residuary beneficiary of any future prosperity the property may enjoy. The prior class "A" stock is limited as to dividends and is noncumulative. It will be largely of a speculative character for some years at best. But the "B" stock is for the present, and for the foreseeable future, principally valuable as a token for speculation. Consequently, its relation to the "A" stock and to the debentures and income bonds which precede it is reasonably sure to cause trouble.

In view of these facts the problem we must face is whether the public interest in the reorganization of these properties and their return to private operation without prolonged further delay and expense outweighs the obvious defects of this agreed plan. On the whole I think it does. Accordingly, although with grave misgivings, I concur in the result.

COMMISSIONERS FREAS and TUGGLE concur in the result.

COMMISSIONER ARPAIA was necessarily absent but if he had been present he would have voted for the adoption of the report.

COMMISSIONER WINCHELL did not participate in the disposition of this case.

200 I. C. C.

N. DURY PAC. R. CO. REORGANIZATION

665

Q. New common stock, class A and class B.—The common stock of the new company shall be divided into two classes, one of which shall be designated as class A and the other of which shall be designated as class B, each of which shall be without par value but shall have a stated value of \$100 per share. The number of shares in each class to be authorized in the certificate of incorporation of the new company shall be fixed by the reorganization managers in relation to the requirements of the plan, and the number of shares in each class to be originally issued shall be in the amounts necessary to carry out the plan. The certificate of incorporation shall permit the authorization from time to time of additional shares of common stock of either class, but shall specifically provide that the new company shall not alter or change the rights of holders of either class of stock or authorize the issuance of additional shares of either class or of any other class or of participating or convertible preferred stock, without the consent of the holders of not less than a majority of the number of shares of common stock of each class at the time outstanding.

Dividends on the class A common stock shall be limited to \$5 a share in any calendar year, irrespective of the amounts which may have been paid on the class B common stock. Dividends on the class A stock shall be noncumulative and none shall be paid in the form of stock or notes or in any form other than cash or its equivalent. In any calendar year, no dividends on class B stock shall be declared or paid unless, during that year, dividends of \$5 per share shall have been paid or declared and set apart for payment on the class A stock, but there shall be no other restriction on the amount of dividends which may be declared and paid on the class B stock.

Class A common stock shall be nonconvertible, and, in the event of dissolution, winding up, or liquidation of the new company, the holders of this class of stock shall be entitled to receive out of the assets of the new company \$100 per share before any distribution is made to the holders of class B common stock, who thereafter shall be entitled to receive any further distributions out of the assets of the new company, without further participation by holders of class A stock.

Each class of common stock shall have full voting rights, and each share of stock shall entitle the holder thereof to one vote. Stockholders shall have the right of cumulative voting in the election of directors.

200 I. C. C.

24) As of December 31, 1972, MoPac had a net income of \$349,192,000. Since MoPac's retained income is in addition to assets sufficient to satisfy fully all liabilities of MoPac, including the maximum permissible distribution on Class A Stock of \$100 per share in the event of liquidation, all \$349,192,000 of MoPac's retained income is allocable or belongs to the Class B equity bearing stock. See page 9 of Alleghany's Complaint, served and filed 5/7/68, 67 Civ. 5095. See also page 19 of the 1972 Annual Report of MoPac.

In addition, as of December 31, 1972, in the same Annual Report on page 21 is the following: "At December 31, 1972 and 1971 consolidated nondepreciable properties, including land and land right were approximately \$545,000,000." "Properties-Properties are stated at estimated original cost, primarily determined as of January 1, 1955 by Interstate Commerce Commission valuations, plus additions and betterments at cost and less retirements since the dates of valuations." Be this as it may, the fact remains that since January 1, 1955 the values of properties, including land and land rights have more than doubled in value, or two times \$545 million or \$1090 million in value on account of the depreciation of the dollar in addition to the great demand for land and land rights on MoPac's properties that contain great natural resources. MoPac has over 5 million acres of land and land mineral rights from the U.S. Government as land grants in the 1800's in order to build the railroads, land rights that contain oil, gas, oil shale, coal, etc. See my exhibit #7. One half of \$1090 million is \$545 million value for property including land and land rights that belong to Class B, equity bearing common stock.

Now \$349,192,000 Retained Income, added to the \$545 million for property including land and land rights belonging to Class B amounts to \$894,192,000 total value for the 39,731 Shares of Class B or \$22,500 value per Class B. This is \$20,000 more value than the \$2,450 per Class B offered for the Class B in value, in addition to the fact that this value comes out of Class B's own values, so when Class B is offered \$2,450 value, this value comes out of Class B's own values, and Mississippi majority Class A owner benefits over \$20,000 per Class B she purchases from Alleghany and others.

In other words, the least that Class B equity bearing Common Stock should have received out of its own values as of December 31 1972 was approximately ten times (10) the \$2,450 it is offered, that is the minimum. The reason why I state that these values come out of Class B's equity bearing values is because the Class B Common is the "residuary beneficiary of any future prosperity the property may enjoy. The prior Class A stock is limited as to dividends and is noncumulative. It will be largely of a speculative character for some years at best. But the B stock is for the present, and for the foreseeable future, principally valuable as a token for speculation." See page 625, 290 I.C.C., Commissioner Mahaffie.

On page 492, 290 I.C.C. it further states as follows: Class A common stock. "Dividends on class A stock would be noncumulative, and none would be paid in the form of stock or notes or in any form other than cash or its equivalent. Class A stock would be nonconvertible, and in the event of dissolution, winding up, or liquidation of the company, the holders of this class of stock would be entitled to receive out of the assets of the company \$100 per share before a distribution is made to holders of class B stock, who thereafter would be entitled to any further distributions out of the assets of the company, without further participation by holders of class A stock.

On page 597, 290 I.C.C., it is stated as follows: "We find that the above described distribution to the old preferred-stock holders of noncumulative nonconvertible no-par value class A stock entitled to \$5 dividends annually, and to receive upon liquidation \$100 per share out of the assets of the reorganized company, would be fair and equitable and would compensate them fully for the rights surrendered."

On page 598, 290 I.C.C. it is further stated as follows: "The groups contend that the provision of the agreed plan eliminating the new preferred stock places control of the new company in the new class A stock although the fact that such stock is noncumulative and nonconvertible would result in entire loss of income by the holders in years of low earnings and a resulting low market price for the stock." "We believe it impossible to reorganize the debtors in a manner equitable to all classes of security holders under a plan which would assure the new

stockholders of a return in every year."

On page 599,290 I.C.C. it is stated as follows: "Under the agreed plan there would be 40,657.17 shares of no-par-value class B stock of \$100 stated value, . . . all to be issued to the Missouri Pacific common stockholders on the basis of one share for 20 old shares . . ." There would be no other limitation upon the dividends which might be declared and paid on this stock."

From the above I.C.C. decision on the "Agreed System Plan" of reorganization of MoPac the Class A stock is like a preferred non cumulative non convertible \$100 liquidating value, with a \$5 dividend when and if earned and declared. Therefore Class A has no money values other than the \$100 per class A liquidating value, or the \$5 per class A which class A is getting. So where else are the values that class B is getting than from class B's own values, and from class B's enormous earnings. Class B equity bearing common earned over \$1,300 per share in 1974 on an I.C.C. accounting basis. What right have the preferred Class A stockholders under the leadership of Mississippi, which controls MoPac and has it under its guidance, to use Class B's own money, earnings and property values with which to pay off Class B with only a small part of Class B's own money and values and earnings, and then keep the rest of class B's values for the benefit of the preferred class A which has a total value at all times of approximately \$185 million? What right has division 3 of the I.C.C. got, under the leadership of Commissioners Tuggle, Deason and MacFarland, to ignore the ICC MoPac "Agreed System Plan" of Reorganization of 1954-1955 which was made into law by the ICC, and by so doing tear up and destroy the law of the United States in order to favor predator Mississippi River (Fuel) Corp., and for to help Alleghany Corp. which was seeking to get under the jurisdiction of the ICC as a motor carrier in order to save millions of dollars annually in taxes by having purchased Jones Motor Corp., and to have the ICC petition Alleghany divestiture of MoPac Class B should be required in order to get Alleghany a motor Company status under the ICC's jurisdiction and so save Alleghany millions of dollars annually in taxes? Must the minority Class B stockholders, who own the equity and property values of MoPac, be made to suffer because the self interest of Alleghany to get motor company status under the ICC jurisdiction says so? The ICC must be forced to evaluate the Class B under legal due process of law to get the real value of Class B equity bearing common stock. The ICC has the expertise to do this. Let the ICC enforce its own laws. The ICC must obey its own MoPac "Agreed System Plan" of Reorganization, of 1954-5.

25) On October 3, 1968, Honorable U.S. Judge Frederick van Fleet Bryan of the U.S. Southern District Court of New York signed a class action order on dividends and conspiracy for Plaintiffs Betty Levin, Alleghany Corporation and Robert LeVasseur, against Mississippi River Corporation, Missouri Pacific Railroad Company, et al 67 Civ. 5097, with an additional order that "any member of the class desiring to intervene in this action must no later than December 20, 1968, either obtain the consent of all parties to said intervention or serve notice of motion to intervene."

Nature of the action was "that dividends were unreasonably and unjustifiably low; that Mississippi had misused its voting control over MoPac's board of directors in furtherance of a plan and conspiracy with directors to improperly favor Mississippi and other Class A stockholders at the expense of the Class B Stockholders."

Recapitalization was never in the pleadings as signed by Hon. Bryan. Now this action has been changed-Recapitalization-as a class action, this Recapitalization is only by court fiat and deception. The Plan of Recapitalization is congenitally wrong, defective and illegal. It matters not that the Class B stockholders have voted for the Plan. Any Class B stockholder can object to its attempted effectuation. I object to this Recapitalization for this reason. It is all a Hobson's choice as Honorable Justice of the United States Supreme Court Mr. Justice Frankfurter said on Writ of Certiorari October Term 1953 on No's 24, 33, 36, and 37, Saint Joe Paper Co., vs. Atlantic Railroad April 5, 1953 to the Court of Appeals for the 5th Circuit.

26) No claim was ever made that jurisdiction on the MoPac case was based on Section 10 (b) of the Securities Exchange Act of 1934. The first mention of this was in paragraph 48 of the Alleghany amended complaint. And the Court, in its Opinion of May 2, 1973, approving the settlement stated "it is interesting to note that plaintiffs do not seek separate relief 10b-5 claim; instead, they urge that the damages be measured by the amount of reasonable dividends allegedly withheld by the defendants during 1964-1971."

It is a mystery at what the Court based its claim that jurisdiction was based on 10b jurisdictional amount.

27) In the Zahn v. International Paper, in a spurious class suit, jurisdiction is based on diversity of citizenship, each and every member of the class must have at stake in the controversy the \$10,000 jurisdictional amount. These MoPac appellants have no such amount.

The court lacks adjudicatory power. . . . because the Settlement in requiring Recapitalization went far beyond the issues in litigation and required the taking of Petitioner's property, which was not in jeopardy, nor under the authority of the Plaintiffs' representatives, without due process of law.

The suit was for better dividends for Class B Stockholders. No cause of action existed for a Plan of Recapitalization. The issue was for dividends.

Those Plaintiffs who represent a class have a trust to pursue the claim or settle within the issues raised. They abandoned their trust and entered an agreement for Recapitalization of MoPac, a result far removed from the pleadings. Moreover, the Plaintiffs - Appellees set the value of the Appellants' stock without providing them the right to independent legal evaluation under due process.

Recapitalization by corraling Appellants and reaching into their pockets to make them pay. . . their equity was reduced from 61.5 to 25.5 %. The Class A defendants - Mississippi - received the difference.

In the settlement of a spurious Class suit, the settlement must have some reasonable relationship to the issues in litigation.

Wherefore Petitioner respectfully prays that this honorable Court of Justice will come to his aid and (a) by protecting his property rights in his MoPac Class B equity bearing stock by evaluating his B stock under due process of law according to the Constitution or laws of the United States to find its true value according to the "Agreed System Plan of Reorganization" of MoPac by the Interstate Commerce Commission in 1954-1955 and the Federal District Court in Saint Louis; both for the benefit of this Petitioner and for the US Government which will benefit by the true evaluation of the MoPac Class B equity bearing properties; (b) either reinstating or dismissing the original suit; (c) or granting an order declaring the Settlement Agreement and proposed Recapitalization and all acts of the parties taken on the basis of the same to be legally void because of lack of proper representation; (d) either reinstating or dismissing the original suit; (e) and for such other and further relief as to this court of justice seems just and proper.

State Of New Jersey
County Of Monmouth
March 5, 1975

Respectfully submitted,

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ELIZABETH A. BULLOCK
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 4, 1979

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James C. Gabriel, Pro Se, being duly
sworn, deposes and says that on the
5th day of March, 1975, he mailed
a true copy of the annexed motion
and affidavit in support of motion.

NOTARY

ELIZABETH A. BUCCINO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 4, 1976

INTERSTATE COMMERCE COMMISSION

No. MC-F-10444¹ALLEGHANY CORPORATION—CONTROL AND PURCHASE—
JONES MOTOR CO., INC.—AND CONTROL ERIE TRUCKING
COMPANY*Decided January 27, 1970*

1. In No. MC-F-10444, acquisition by Alleghany Corporation of control of Jones Motor Company, Inc., and its motor carrier subsidiary, Erie Trucking Company, through purchase of capital stock of Jones Motor Company, Inc.; and merger of a wholly owned subsidiary of Alleghany Corporation into Jones Motor Company, Inc.; and subsequently the merger of Jones Motor Company, Inc., into Alleghany Corporation for ownership, management, and operation; and acquisition by Fred M. Kirby and Allan P. Kirby, Jr., individually and as co-guardians of the property of Allan P. Kirby, an incompetent, of control of the operating rights and property through the transaction, approved and authorized, subject to conditions.
2. In Finance Docket No. 25656, Jones Motor Company, Inc., authorized to issue not exceeding 100 shares of its common stock, par value \$1.
3. In Finance Docket No. 18656, previous orders of Commission vacated.
4. In No. MC-FC-70907, application dismissed.

*David G. Macdonald and M. Lauck Walton for applicants.**Bernard A. Gould and Warren I. Cohn for Bureau of Enforcement.*

REPORT OF THE COMMISSION

HARDIN, Commissioner:

Alleghany Corporation, a holding company with total assets in excess of \$200 million, is at present subject to dual regulation under the Investment Company Act and the Interstate Commerce Act (act). It seeks, by a series of transactions hereinafter discussed, to become a motor common carrier subject to the plenary jurisdiction of the Interstate Commerce Commission under part

¹This report also embraces Finance Docket No. 25656, Jones Motor Co., Inc., stock; Finance Docket No. 18656, Louisville & Jeffersonville Bridge and Railroad Company, Merger, Etc.; and No. MC-FC-70907, Alleghany Corporation, Trans-
fer, Jones Motor Company, Inc., Transferor.

By an agreement dated September 26, 1968, between Alleghany and Marine Midland, Marine Midland agreed to accept all stock tendered through the above tender offer in order for Alleghany to avoid any question under section 5 of the act. Marine Midland was then to exercise all stockholders' rights as to the stock deposited to take any action necessary to protect the shares of stock. The shares are to be released upon surrender of the voting trust certificates delivered to Alleghany, accompanied by a certificate requesting release and certifying one or more of the following: (1) that the shares to be released have been sold to one or more persons not affiliated with Alleghany; (2) that an opinion has been rendered by counsel for Alleghany that assumption of control of Jones by Alleghany would not violate the act; (3) that an order has been issued by the Commission terminating its order of March 2, 1955, in *Louisville & J. B. & R. Co. Merger*, *supra*; or (4) that an order has been issued by the Commission approving release of such shares for any reason whatsoever.

By a letter agreement dated September 27, 1968, Trucking would be merged into Jones with Jones as the surviving corporation. Pursuant to the merger plan, the 100 shares of Trucking's \$0.01 par stock will be converted into 100 shares of Jones' newly issued common stock of \$1 par value. The \$99 excess will be charged to Jones' additional paid-in capital. Alleghany will surrender without consideration to Jones the shares of common stock of Jones held by Alleghany or its voting trustee. These shares will be converted into additional paid-in capital by Jones. The remaining shares of Jones held by minority stockholders will be converted into the right to receive \$21 per share. Trucking will transfer to Jones an amount to satisfy this obligation. Further, Jones will purchase from Alleghany and retire its outstanding preferred stock. Alleghany will waive payment and these preferred shares will also be converted into additional paid in capital by Jones. As of January 10, 1969, 605,715 shares, or 98.19 percent of the outstanding shares of common stock, and all of the 3,356 outstanding shares of preferred stock of Jones were acquired by the voting trustee for Alleghany.

In related Finance Docket No. 25686, Jones is seeking authority under section 214 of the act for the issuance of 100 shares of \$1 par value common stock. Such 100 shares, as previously mentioned, will be issued to Alleghany in conversion for all of the 100 outstanding shares of Trucking. Upon completion of the proposed control and purchase, Alleghany will hold the 100 shares of the

newly issued common stock of Jones, and Jones will have no other capital stock outstanding.

One of the primary reasons presented by Alleghany for acquisition of the operating rights of Jones is to lessen its tax burden. Such burden arises from the fact that Allan P. Kirby, as of February 28, 1969, was the beneficial owner of 4,084,813 shares, or 56.21 percent of the outstanding common stock of Alleghany. Alleghany is, therefore, for Federal income tax purposes, considered a personal holding company since one person (less than 5 individuals) owns more than 50 percent of its stock and has "personal holding income," (60 percent or more of adjusted gross income consists of dividends and interest) and is therefore subject to a 70-percent penalty tax on the "undistributed personal holding income." Alleghany does not want to distribute all such income to avoid the tax. With Alleghany the recipient of the operating revenue generated by its Jones Motor Division, it alleges it would be an operating company rather than a holding company for Federal tax purposes. It could then retain and reinvest net earnings and would not be subject to the 70-percent penalty tax.

Evidence of past operations by Jones under its operating rights is reflected in an abstract of shipments showing all shipments transported in January 1969. The traffic handled consisted of a wide variety of commodities, showing service to points throughout Jones' authority.

In its verified statement filed on October 1, 1969, Alleghany stated that as of February 1, 1968, the date of the Penn Central merger authorized by the Commission in *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, Alleghany received and still holds 196,195 shares or 0.81 percent of the 24,104,708 shares outstanding of Penn Central stock. In addition, Allan P. Kirby, controlling stockholder of Alleghany, received and presently holds 390,130 shares or 1.62 percent of the outstanding Penn Central shares. Combining their interests, Alleghany and Kirby together own 2.43 percent of the outstanding Penn Central stock. Alleghany's shares in Penn Central are held in its own name but the Kirby shares are among those held in the name of Sigler and Company.

Alleghany is also the controlling shareholder of Investors Diversified Services, which serves as an investment advisor and distributor for a group of mutual funds. As of September 30, 1969, these mutual funds held 391,900 shares or 1.63 percent of the outstanding shares of Penn Central. It is alleged investment

during the period of the trust. Prior to consummation of the transaction proposed herein, Alleghany shall submit for approval of the Commission a plan showing how it intends to effectuate such trusteeship. While undoubtedly the divestiture of Penn Central shares by the trustee may have certain tax consequences, i.e., either the sale will result in a profit or a loss, Alleghany may avoid the tax consequence by electing not to consummate the proposed transaction. Further, the record before us indicates that the trustee should experience little difficulty in disposing of 390,130 shares of Penn Central now owned by Alleghany. Contained in the affidavit of Fred M. Kirby, previously referred to, is the following statement:

15. As of April 9, 1969, the date of the aforesaid Application under §5, the total amount of the capital stock of Penn Central owned by the funds sponsored by IDS [Investors Diversified Services, Inc.] was 1,020,000 shares or approximately 4.23% of the total amount outstanding, all of which were held for investment purposes only and not for purposes of control. As of this date [September 30, 1969], all but 391,900 of said shares, representing approximately 1.63% of the Penn Central capital stock outstanding, have been sold.

We will further require as a condition to approval that all interlocking directorates between Alleghany and Penn Central, its subsidiaries, and affiliates be terminated. Prior to consummation, proof of such termination shall also be submitted to the Commission. *Chesapeake & O. Ry. Co. Purchase*, 261 I.C.C. 239. Still further, in accordance with Alleghany's suggestion, and our own independent evaluation of the situation, we shall require as a condition for consummation of the proposal that the trusteeship of Alleghany's MoPac securities, as previously ordered by the Commission, be continued subject to the continuing jurisdiction of the Commission. The Commission in the future may either in response to a petition or on its own motion institute an investigation to determine whether the trust should be continued or whether Alleghany's divestiture of MoPac securities should be required.

The Penn Central shares not owned by Alleghany, but controlled by Fred M. Kirby and Allan P. Kirby, Jr., as coguardians of the property of their father, Allan P. Kirby, present a special problem. The 390,130 shares of Penn Central owned by Allan P. Kirby represent 1.62 percent of the outstanding Penn Central shares. While Fred M. Kirby and Allan P. Kirby, Jr., are by the terms of the conditions imposed relating to interlocking

directorships prohibited from serving on the board of both Alleghany and Penn Central, either brother may resign his position with Alleghany and serve on the Penn Central board. In order to forestall the possibility of one of the coguardians electing to serve on the Penn Central board and the other coguardian electing to serve on the board of Alleghany, it is appropriate that a condition be fashioned to prevent the Kirby family from serving as a bridge over which affiliation between the Penn Central and Alleghany might be established. Accordingly, we shall require that the Penn Central shares owned by Allan P. Kirby under the control of Fred M. Kirby and Allan P. Kirby, Jr., as coguardians of their father's property, be deposited with an independent voting trustee under an agreement subject to the prior approval of the Commission. While not at this time directing that said trust be terminated by divestiture of Penn Central shares within a prescribed period, we shall retain continuing jurisdiction over the trust for the purpose of imposing in the future additional conditions or modifying the trust if warranted by then existing factual conditions.

There is also present in the record evidence of various interlocking directorates between Penn Central, Pittston Company, Alleghany, International Utilities, Inc., and other carriers. The cancellation of the interlocking directorates that exist between Alleghany and Penn Central should do much to simplify the relationship between these carriers. Other than in the situation that would exist between Alleghany and Penn Central if the proposed transaction were approved without conditions, the record does not contain sufficient evidence to determine the relationship between Alleghany and these other carriers and holding companies. If it should subsequently appear that these other carriers have become affiliated with Alleghany within the meaning of section 5(6) of the act or are otherwise operating in violation of the act, we expressly reserve the right to reopen these proceedings for the purpose of imposing further conditions upon Alleghany. At this time we will merely require that Alleghany's shares of International Utilities, Inc., be continued to be controlled by an independent voting trustee.

Before reaching the issues presented by the section 5(2) application, we must first determine whether the facts of record disclose a section 5(4) violation. Section 5(4) provides, in part, as follows:

109 M.C.C.

Before The
INTERSTATE COMMERCE COMMISSION

Docket No. 27346

APPLICATION OF MISSOURI PACIFIC RAILROAD COMPANY
UNDER SECTION 20a OF THE INTERSTATE COMMERCE ACT
FOR AN ORDER AUTHORIZING ISSUANCE OF SECURITIES

BRIEF OF ALLEGHANY CORPORATION, INTERVENOR IN
SUPPORT OF THE APPLICATION

M. Lauck Walton, Esq.
30 Rockefeller Plaza
New York, New York 10020
Attorney for Alleghany
Corporation

Of Counsel:

Donovan Leisure Newton & Irvine

Filing Date: October 6, 1973

share that Alleghany will receive. To the extent that Alleghany's majority position (which carried with it the power to veto certain corporate actions) has any "premium" value, that "premium" is included in the consideration to be received by each and every Class B shareholder alike.

II

THE TERMINATION OF ALLEGHANY'S INTEREST IN MOPAC SECURITIES WILL PROMOTE THE PUBLIC INTEREST

The divestiture of Alleghany's security holdings in MoPac, pursuant to the Plan of Reorganization, would also promote the public interest.

In a prior proceeding before this Commission, Alleghany's acquisition of the Jones Motor Company, Inc., a common carrier by motor vehicle, was approved. Alleghany Corporation - Control and Purchase - Jones Motor Co., Inc. - and Control Erie Trucking Company, No. MC-F-10444, 109 MCC 333, decided January 27, 1970.

The Commission, as a condition to its authorization, ordered that the trusteeship of Alleghany's MoPac securities be continued. The Commission noted "... either in response to a petition or on its own motion [it may] institute an investigation to determine whether the trust should be continued or whether Alleghany's divestiture of

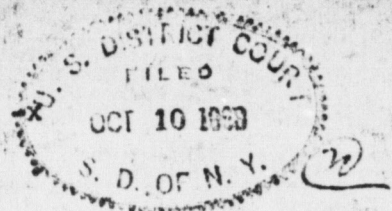
MoPac securities should be required." Alleghany Corporation
- Control and Purchase - Jones Motor Co., Inc. - and Control
Erie Trucking Company, supra, at 350.

Undoubtedly the Commission, in so ordering, weighed the unique characteristics of MoPac Class B stock, including the absence of a broad and liquid market for that security. (See Exhibit #2, Testimony of F. L. Lee Jones.) The Commission was undoubtedly aware that the sale of Alleghany's B shares in the usual way was simply impossible, and to so order would cause great financial injury to Alleghany as well as to the minority Class B stockholders, the price of whose stock would be substantially depressed by the forced sale of the controlling block of B shares.

Furthermore, it is clearly conducive to the public interest that the Commission be relieved of the obligation of overseeing this trust, while at the same time achieving a solution which will not harm Alleghany, which is also a carrier subject to the Commission's jurisdiction.

Clearly, an excellent procedure for eliminating or virtually eliminating Alleghany's ownership of MoPac B stock is that embodied in the Plan of Reorganization.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



BETTY LEVIN, ALLEGHANY CORPORATION
and ROBERT LE VASSEUR,

Plaintiffs,

-against-

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD
COMPANY, ROBERT H. CRAFT, T.C.
DAVIS and THOMAS MILBANK,

67 Civ. 5095

NOTICE OF
SETTLEMENT OF
ORDER

Defendants.:

S I R S :

PLEASE TAKE NOTICE that an order, a true copy of which
is annexed hereto, will be presented for settlement and signature
by the Honorable Frederick van Pelt Bryan at the Office of the
Clerk, in Room 601 of the United States Courthouse, Foley Square,
New York, New York, on October 14, 1968 at 10:00 A.M.

New York, New York
October 9, 1968

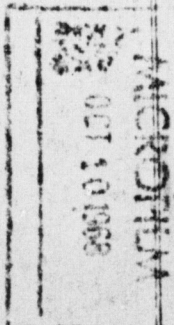
Yours, etc.,

ORANS ELSEN & POLSTEIN
Attorneys for Plaintiff
Betty Levin
Office & P.O. Address
10 East 40th Street
New York, N.Y. 10016

DONOVAN LEISURE NEWTON & IRVIN
Attorneys for Plaintiff
Alleghany Corporation
Office & P.O. Address
2 Wall Street
New York, N.Y. 10005

TO:

SULLIVAN & CROMWELL, ESQS.
Attorneys for Defendants
Missouri Pacific Railroad
Company, Robert H. Craft,
T.C. Davis and Thomas F.
Milbank
48 Wall Street
New York, N.Y. 10005



plaintiffs of said printed notices in envelopes; and it is further

ORDERED that the reasonable expenses of said mailing shall be borne jointly and severally by the plaintiffs; and it is further

ORDERED that defendant Missouri Pacific Railroad Company shall file an affidavit of mailing with the Court promptly after the aforesaid mailing, which affidavit shall contain the name and address of each person to whom the notice was mailed; and it is further

ORDERED that any member of the class desiring to intervene in this action must, no later than December 2, 1968, give notice of intention to intervene in the manner set forth in the appended Notice, and thereafter must, no later than December 20, 1968, either obtain the consent of all parties to said intervention or serve notice of motion for leave to intervene.

Dated: New York, New York
October 7, 1968

Frederick van Pelt Bryan
Frederick van Pelt Bryan
U.S.D.J.

a majority of the Class B shares outstanding.

All plaintiffs sue on behalf of themselves and all other MoPac Class B stockholders. In addition, plaintiffs Betty Levin and Robert LeVasseur assert certain claims derivatively on behalf of MoPac.

Defendants are: Mississippi River Corporation (hereinafter referred to as "Mississippi"), holder of a majority of the outstanding Class A stock of MoPac; MoPac; Robert H. Craft and Thomas Milbank, both of whom are directors of Mississippi and MoPac; and T. C. Davis, a director of MoPac.

NATURE OF THE ACTION

This action was commenced by Betty Levin on December 29, 1967. Alleghany Corporation and Robert LeVasseur subsequently were, upon their motions, permitted to intervene as additional plaintiffs.

The complaints filed by all three plaintiffs charge, in substance, that dividends declared and paid by the MoPac board of directors on the Class B stock have been and are unreasonably and unjustifiably low; that Mississippi has misused its voting control over MoPac's board of directors in furtherance of a plan and conspiracy with said directors to improperly favor Mississippi and other Class A stockholders at the expense of the Class B stockholders; and that such conduct will continue unless enjoined by the Court. The complaints ask the Court to direct MoPac to pay reasonable dividends for past years to all Class B stockholders, plus interest thereon; that

PROSPECTUS

1,200,000 Shares Common Stock
(\$10 Par Value)

MISSISSIPPI RIVER FUEL CORPORATION

EXCHANGE OFFER TO HOLDERS OF CLASS A CAPITAL STOCK
OF
MISSOURI PACIFIC RAILROAD COMPANY

The 1,200,000 shares of Common Stock of Mississippi River Fuel Corporation covered hereby are offered by it to the holders of Class A Capital Stock of Missouri Pacific Railroad Company at the rate of one and one-third ($1\frac{1}{3}$) shares of Mississippi River Fuel Corporation Common Stock for one (1) share of Missouri Pacific Railroad Company Class A Stock (i.e., four (4) Mississippi for three (3) Missouri Pacific). The Exchange Offer is subject to the approval and ratification of the stockholders of Mississippi River Fuel Corporation and is made on the terms and conditions which are more fully set forth herein under the heading "Exchange Offer to Holders of Class A Stock of Missouri Pacific Railroad Company." Mississippi will have no obligation to effect the exchange if less than 900,000 shares of Missouri Pacific Class A Capital Stock are tendered pursuant to the Offer.

The Exchange Offer will expire at 3:00 o'clock P.M., New York Time, on November 21, 1962 (the "Expiration Date"), unless 900,000 shares of Class A Stock of Missouri Pacific have been duly deposited for exchange prior thereto or unless such Expiration Date is extended as provided herein.

The Exchange Offer may be accepted by the deposit with Mercantile Trust Company, St. Louis, Exchange Agent, or Morgan Guaranty Trust Company of New York, Forwarding Agent for the Exchange Agent, of certificates for shares of Class A Capital Stock of Missouri Pacific Railroad Company, together with a duly completed and executed Exchange Form provided for that purpose.

Eastman Dillon, Union Securities & Co. and Dempsey-Tegeler & Co., Inc. will form and act as Managers of a group of Soliciting Dealers, including themselves, which will solicit exchanges. Mississippi River Fuel Corporation will pay commissions as described herein for exchanges effected through efforts of dealers. On the basis of the closing price of Missouri Pacific Class A Stock on the New York Stock Exchange on October 15, 1962, the commission payable on an exchange of 100 shares of Missouri Pacific Class A Capital Stock would be \$82.26. In addition, Mississippi River Fuel Corporation will incur out-of-pocket expenses estimated at \$123,000, and will pay Eastman Dillon, Union Securities & Co. and Dempsey-Tegeler & Co., Inc. \$30,000 as compensation for their services as Dealer Managers and will reimburse them for their out-of-pocket expenses in that capacity.

Eastman Dillon, Union Securities & Co., Dempsey-Tegeler & Co., Inc. and the Soliciting Dealers and other dealers who receive commissions from Mississippi may be deemed to be Underwriters within the meaning of the Securities Act of 1933. Mississippi has agreed to indemnify the Soliciting Dealers against certain liabilities, including liabilities under the Act.

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE
SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION
PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS.
ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

The date of this Prospectus is October 18, 1962.

fringement, an accounting for damages and profits of an unspecified amount, a reasonable attorney's fee and cost of suit. Milwhite has answered, denying infringement and alleging that the Puget Sound patent is invalid. Uni Cal is manufactured for Milwhite by third parties. Prior to the Houston suit one of Milwhite's manufacturers of Uni Cal filed a suit in the United States District Court in Seattle, Washington, for a declaratory judgment that Puget Sound's patent is invalid. Puget Sound has counter-claimed in that suit, claiming infringement of the Puget Sound patent by such manufacturer. Milwhite is not a party to the declaratory judgment proceedings. Neither suit has been tried nor set for trial. Milwhite has been advised by patent counsel that in their opinion the Puget Sound patent should be held invalid and that Milwhite's product does not infringe.

BUSINESS AND PROPERTY OF MISSOURI PACIFIC RAILROAD COMPANY

General

The Missouri Pacific Railroad Company was incorporated in 1917 under the laws of the State of Missouri with a duration of 900 years. It succeeded through reorganization to the business and properties of railroad corporations which had operated the Missouri Pacific System for a number of years prior thereto.

In 1933 proceedings were instituted for the reorganization of Missouri Pacific and various of its subsidiaries under Section 77 of the Bankruptcy Act. In 1954 the Interstate Commerce Commission approved a Plan of Reorganization which, in turn, was approved November 9, 1954, and confirmed September 19, 1955, by the United States District Court for the Eastern District of Missouri, Eastern Division. On March 1, 1956, that Court entered its Consummation Order and Final Decree directing that the Plan be consummated effective as of January 1, 1955. In accordance with the Plan and the Consummation Order and Final Decree, the distribution of cash and new securities of Missouri Pacific was effected, its Articles of Association were amended, and various subsidiaries were merged with and into it to form the present railroad company.

The Missouri Pacific System consists of the parent corporation and the following subsidiary and associated companies:

(1) **Missouri Pacific Railroad Company wholly-owned railway subsidiaries**

Doniphan, Kensett & Searcy Railway
Iron Mountain Railroad Company of Memphis
Natchez & Southern Railway
New Orleans and Lower Coast Railroad Company
St. Joseph Belt Railway Company
Union Railway Company
Union Terminal Railway Company

(2) **The Texas and Pacific Railway Company, of which Missouri Pacific Railroad Company owns 81.56% of the voting stock.**

(3) **The Texas and Pacific Railway Company wholly-owned railway subsidiaries**

Abilene and Southern Railway Company
The Denison and Pacific Suburban Railway Company
Texas-New Mexico Railway Company
The Weatherford, Mineral Wells and Northwestern Railway Company

(4) **Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans - the stock of which is owned one half by Missouri Pacific Railroad Company and one half by The Texas and Pacific Railway Company.**

(5) **Fort Worth Belt Railway Company - the stock of which is owned 40% by Missouri Pacific Railroad Company and 60% by The Texas and Pacific Railway Company.**

- (6) **The Missouri-Illinois Railroad Company**, of which Missouri Pacific owns 54.4% of the outstanding stock.

The Missouri Pacific System, through the Missouri Pacific Railroad Company and The Texas and Pacific Railway Company, in addition to minority interests in various terminal companies, also has the following significant subsidiaries and investments in other companies:

American Refrigerator Transit Company: This is a car rental company owning approximately 8,191 refrigerator cars which are leased to a number of railroad carriers. The Missouri Pacific Railroad Company owns 3,550 shares of the 5,000 shares of outstanding Capital Stock. There is no funded debt except equipment obligations outstanding at December 31, 1961, in the principal amount of \$9,810,000.

Galveston, Houston and Henderson Railroad: Missouri Pacific owns 50% of the stock of this company, which operates approximately 107 miles of track extending between Houston and Galveston, Texas.

Houston Belt & Terminal Railway: Missouri Pacific owns 50% of the stock of this company which performs switching services within the limits of Houston, Texas.

Brownsville & Matamoros Bridge Company: Missouri Pacific owns 50% of stock of this company which owns and operates a bridge over the Rio Grande connecting with the National Railways of Mexico.

Southern Illinois and Missouri Bridge Company: This company owns 9.24 miles of track between Thebes, Illinois, and Illmo, Missouri, including a double track steel bridge over the Mississippi River between those points. This bridge and trackage provide a connection with the main line of the Missouri Pacific at Thebes and the St. Louis-Southwestern Railway Company at Illmo. Missouri Pacific owns 300 of the 500 shares of outstanding Capital Stock.

Missouri Pacific Truck Lines, Inc.: This company operates common carrier truck freight service over 11,415 miles of routes in the States of Arkansas, Illinois, Kansas, Louisiana, Mississippi, Missouri, Nebraska, Tennessee and Texas. It also performs a substitute service for the Company in handling certain less-than-carload traffic. The Missouri Pacific owns all of the outstanding securities.

The Texas and Pacific Motor Transport Company: This is a wholly-owned subsidiary of The Texas and Pacific Railway, which operates 3,085 miles of truck routes in Texas and Louisiana.

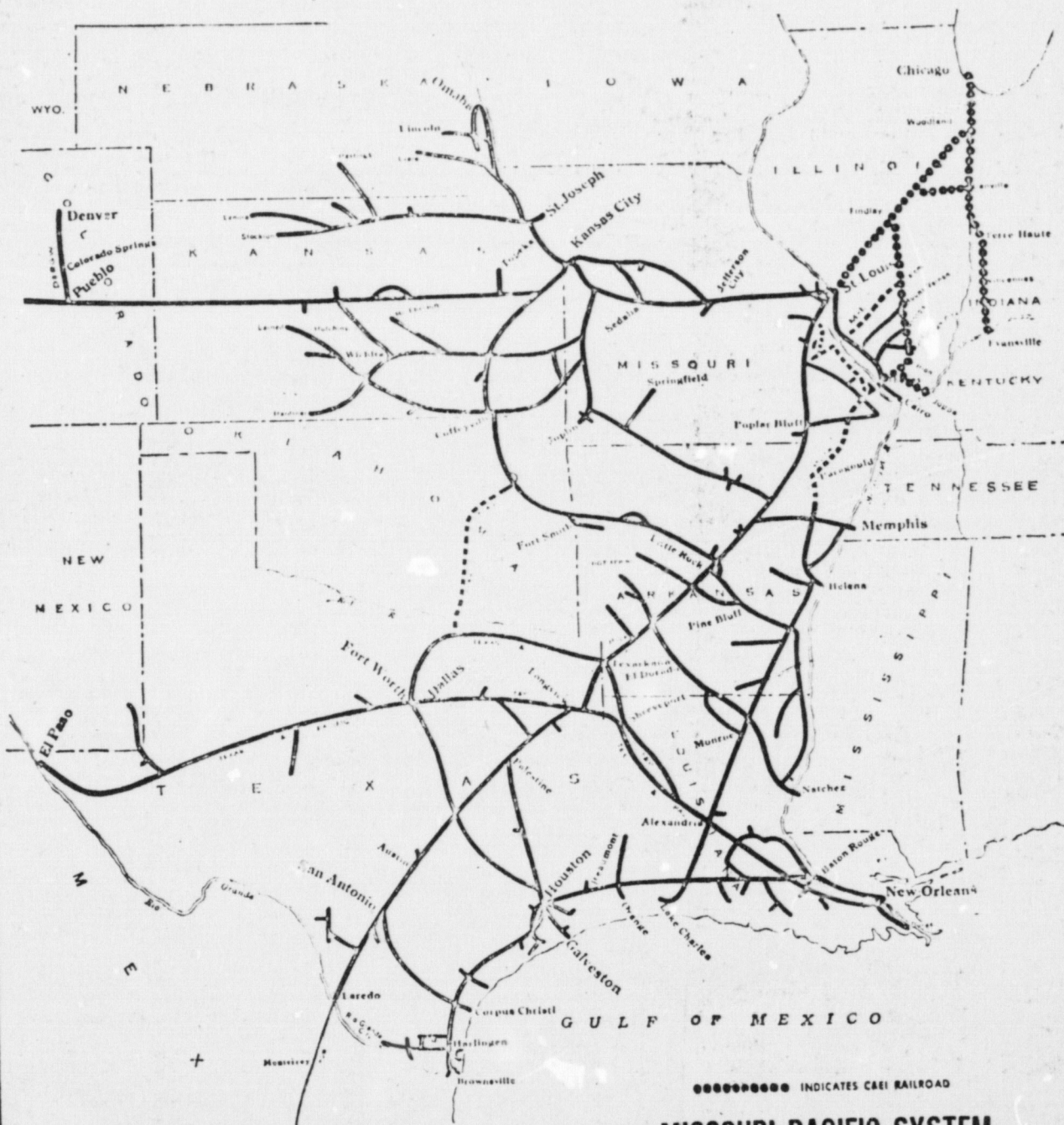
✓ **Western Coal and Mining Company:** This company owns mineral rights in 61,807 acres of land in the States of Arkansas, Illinois, Kansas, Missouri, and Oklahoma. It conducts no mining operations, but portions of the land are leased to others for mining and other purposes. Missouri Pacific owns all of the outstanding securities.

✓ **Missouri Improvement Company:** This company owns lands in various states. Its stock is 100% owned by Missouri Pacific.

✓ **Eagle Ford Land & Industrial Company:** This company owns lands in various counties in Texas. Texas and Pacific Railway Company owns 100% of its stock.

The Merchants Cold Storage Company: This company is 100% owned by The Texas and Pacific Railway Company and owns and operates warehouse facilities in Fort Worth, Texas.

The Missouri Pacific also owns 23,600 shares of Class A Stock and 74,104 shares of Common Stock of the Chicago & Eastern Illinois Railroad Company, which shares represent 19.31% of all the presently outstanding voting stock of said railroad. Directly or indirectly Missouri Pacific also owns \$970,000 of C & E I's convertible General Mortgage Bonds. All Chicago and Eastern Illinois shares of stock owned are trusted with The Marine Midland Trust Company of New York as an independent voting trustee, and Missouri Pacific presently has pending before the Interstate Commerce Commission an application seeking authority to acquire control through stock ownership of said Chicago & Eastern Illinois Railroad. Reference is made to the heading "Control of the Chicago & Eastern Illinois Railroad Company" for a discussion of the status of this proceeding. Reference is also made to the heading "Control of The Kansas, Oklahoma & Gulf Railway Company et al." for a discussion of the contract



..... INDICATES C&O RAILROAD

MISSOURI PACIFIC SYSTEM

PROSPECTUS

1,200,000 Shares Common Stock
(\$10 Par Value)

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EXCHANGE OFFER TO HOLDERS OF CLASS A CAPITAL STOCK
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The Exchange Offer will expire at 3:00 o'clock P.M., New York Time, on November 21, 1962 (the "Expiration Date"), unless 900,000 shares of Class A Stock of Missouri Pacific have been duly deposited for exchange prior thereto or unless such Expiration Date is extended as provided herein.

The Exchange Offer may be accepted by the deposit with Mercantile Trust Company, St. Louis, Exchange Agent, or Morgan Guaranty Trust Company of New York, Forwarding Agent for the Exchange Agent, of certificates for shares of Class A Capital Stock of Missouri Pacific Railroad Company, together with a duly completed and executed Exchange Form provided for that purpose.

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St. Joseph Belt Railway Company
Union Railway Company
Union Terminal Railway Company

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The Denison and Pacific Suburban Railway Company
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Houston Belt & Terminal Railway: Missouri Pacific owns 50% of the stock of this company which performs switching services within the limits of Houston, Texas.

Brownsville & Matamoros Bridge Company: Missouri Pacific owns 50% of stock of this company which owns and operates a bridge over the Rio Grande connecting with the National Railways of Mexico.

Southern Illinois and Missouri Bridge Company: This company owns 9.24 miles of track between Thebes, Illinois, and Ilmo, Missouri, including a double track steel bridge over the Mississippi River between those points. This bridge and trackage provide a connection with the main line of the Missouri Pacific at Thebes and the St. Louis-Southwestern Railway Company at Ilmo. Missouri Pacific owns 300 of the 500 shares of outstanding Capital Stock.

Missouri Pacific Truck Lines, Inc.: This company operates common carrier truck freight service over 11,445 miles of routes in the States of Arkansas, Illinois, Kansas, Louisiana, Mississippi, Missouri, Nebraska, Tennessee and Texas. It also performs a substitute service for the Company in handling certain less-than-carload traffic. The Missouri Pacific owns all of the outstanding securities.

The Texas and Pacific Motor Transport Company: This is a wholly-owned subsidiary of The Texas and Pacific Railway, which operates 3,085 miles of truck routes in Texas and Louisiana.

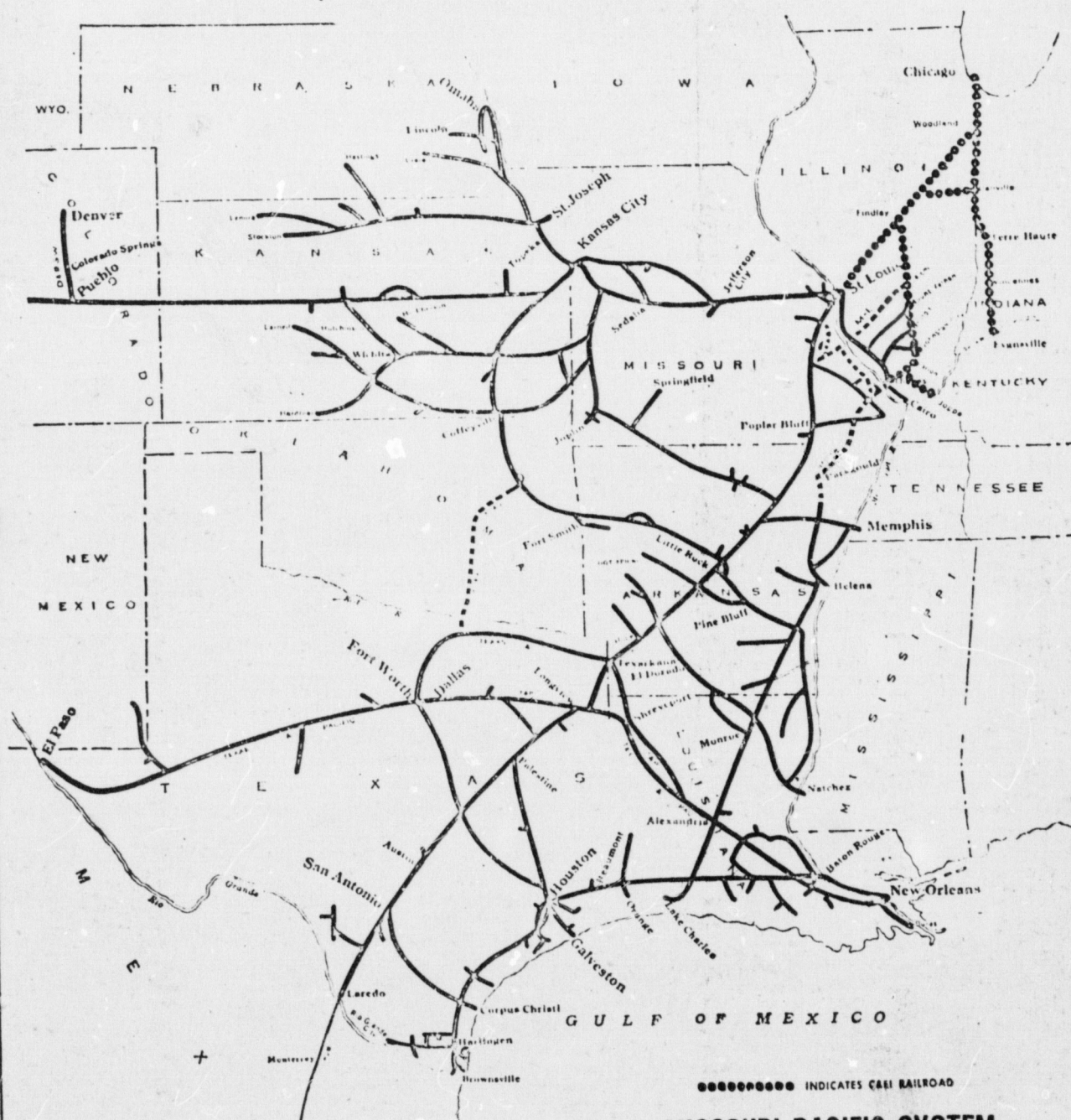
✓ **Western Coal and Mining Company:** This company owns mineral rights in 61,807 acres of land in the States of Arkansas, Illinois, Kansas, Missouri, and Oklahoma. It conducts no mining operations, but portions of the land are leased to others for mining and other purposes. Missouri Pacific owns all of the outstanding securities.

✓ **Missouri Improvement Company:** This company owns lands in various states. Its stock is 100% owned by Missouri Pacific.

✓ **Eagle Ford Land & Industrial Company:** This company owns lands in various counties in Texas. Texas and Pacific Railway Company owns 100% of its stock.

The Merchants Cold Storage Company: This company is 100% owned by The Texas and Pacific Railway Company and owns and operates warehouse facilities in Fort Worth, Texas.

The Missouri Pacific also owns 23,600 shares of Class A Stock and 74,104 shares of Common Stock of the Chicago & Eastern Illinois Railroad Company, which shares represent 19.31% of all the presently outstanding voting stock of said railroad. Directly or indirectly Missouri Pacific also owns \$970,000 of C & E I's convertible General Mortgage Bonds. All Chicago and Eastern Illinois shares of stock owned are trustee with The Marine Midland Trust Company of New York as an independent voting trustee, and Missouri Pacific presently has pending before the Interstate Commerce Commission an application seeking authority to acquire control through stock ownership of said Chicago & Eastern Illinois Railroad. Reference is made to the heading "Control of the Chicago & Eastern Illinois Railroad Company" for a discussion of the status of this proceeding. Reference is also made to the heading "Control of The Kansas, Oklahoma & Gulf Railway Company et al." for a discussion of the contract



United States District Court
Southern District of New York
Betty Levin, Alleghany Corporation
and Robert LeVasseur,

: 87 Civ. 5095 (SW)

Plaintiffs, : Affidavit In Opposition To Affidavit

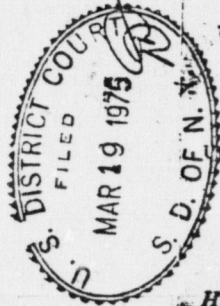
Mississippi River Corporation,
Missouri Pacific Railroad Company,
Robert H. Craft, T.C. Davis and
Thomas F. Milbank,

: Representing Alleghany Corporation

Defendants.

: et al, Who are Opposing the I.C.C.
Finance Docket #3918 MoPac "Agreed
System Plan of Reorganization"
Submitted July 6, 1954, Decided July
29, 1954 by the Interstate Commerce
Commission, in Washington, D.C.

James C. Gabriel, Pro Se, being
duly sworn, deposes and says:
That M. Lauck Walton, Representing
Alleghany Corp. et al, are
opposing the following "Agreed
System Plan of Reorganization"
of MoPac of 1954 by the I.C.C.
by not living up to the "Agreed
System Plan" in their new Plan
of Recapitalization of 1973.



INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 9918

MISSOURI PACIFIC RAILROAD COMPANY REORGANIZATION

Submitted July 6, 1954. Decided July 29, 1954.

on supplemental record made at reopened hearings held pursuant to the provisions of paragraph (b) of section 208, title 11, U. S. Code, and section 77, of the Bankruptcy Act, as amended, plan of reorganization for the Missouri Pacific Railroad Company, and others, debtors, modified and approved.

Appearances as in prior reports and, in addition, *Arthur Arsham, Harold Brown, Walter H. Brown, Jr., Carl B. Callaway, Allan P. Conwill, Joseph A. Doyle, Felix A. Fishman, Edward L. Friedman, Jr., Emanuel Gruss, Edward J. Hickey, Jr., John P. Humes, Percival E. Jackson, Jerome M. Kirshbaum, Ferdinand H. Kolrood, Alan S. Kuller, Frederick M. Myers, Jr., Eldon S. Olson, William P. Palmer, David M. Potts, Thomas J. Sheehan, Jr., John Ben Shepperd, Alfonso E. Solana, Henry I. Stimson, Alfred B. Teton, Jay W. Tracey, Jr., and Lionel E. Zuna.*

SEVENTH SUPPLEMENTAL REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed to the report proposed by members of the staff of our Bureau of Finance. Thereafter, the bankruptcy trustee, acting pursuant to authorization and direction of the United States district court of jurisdiction in these proceedings, filed with us a petition accompanied by a stipulation and agreement, executed by a majority of the parties in interest, embracing certain modifications of the proposed report recommendations, which, if adopted, would be acceptable to the parties signatory to the stipulation and agreement as an agreed system plan. Our conclusions differ somewhat from those contained in the proposed report.

Request for oral argument on exceptions was made by the independent directors of the Missouri Pacific Railroad Company, debtor. Similar requests made by the Alleghany Corporation, owner of approximately 49 percent of Missouri Pacific common stock, and Oscar Gruss & Son, holders of International-Great Northern Railroad Company adjustment mortgage bonds, were later withdrawn, with the res-

¹For previous reports see 238 I.C.C. 2; 240 I.C.C. 25; 257 I.C.C. 479 and 745; 276 I.C.C. 30 and 503, and 282 I.C.C. 529.

date, on 30 days' notice, at their principal amount plus all interest due and payable thereon.

(b) New equity issues.—In lieu of the issue of a \$100 par value preferred stock and 1 class (A) of no-par-value common stock (exclusive of possible issue of a class B stock upon exercise of warrants issuable to old common-stock holders) recommended in the proposed report, the stock of the reorganized company would consist of 2 classes of common stock, designated A and B, both of which would be without par value and would have full voting rights. Each share of class A stock would have a stated value of \$100, and each share of class B stock would have a stated value of either \$100 or \$50, to be determined by the Commission.

(c) Class A common stock.—Dividends on this class of new common stock would be limited to either \$5 or \$4 per share in a calendar year, as the Commission shall determine, irrespective of what amounts may have been paid on class B common stock. Dividends on class A stock would be noncumulative, and none would be paid in the form of stock or notes or in any form other than cash or its equivalent. Class A stock would be nonconvertible, and in the event of dissolution, winding up, or liquidation of the company, the holders of this class of stock would be entitled to receive out of the assets of the company \$100 per share before a distribution is made to holders of class B stock, who thereafter would be entitled to any further distributions out of the assets of the company, without further participation by holders of class A stock.

The total stated value of class A common stock, \$201,824,761, recommended in the proposed report, would be reduced to \$191,755,818 in order to (a) eliminate the amount of \$8,561,839 which was thereunder allocated to the Missouri Pacific secured serial bonds and \$293,639 allocated to the New Orleans publicly held stock and (b) take account of the reduction of \$6,213,463 in the allotment to International adjustment mortgage bonds as set forth in paragraph (g) hereof.

(d) Class B common stock.—This class of new common stock, having a total stated value of \$4,065,717, would be issued only to holders of Missouri Pacific common stock on a basis of 1 share of new, of a stated value of \$100 per share, for each 20 shares of old stock, or, in the alternative, in the discretion of the Commission, 1 share of new, of a stated value of \$50 per share, for each 10 shares of old stock.

No dividends could be declared on class B common stock in any calendar year unless, during that year, dividends of \$5 or \$4 (whichever is prescribed by the Commission) have been paid or set apart for payment on the class A common stock; but there would be no other restriction on amount of dividends which may be declared and paid on the class B stock.

We conclude that we should approve, as fair and equitable, the distribution to the old preferred-stock holders of new class A common stock in the amount of 1 share for each \$100 par value of the preferred stock and for each \$100 of accumulated dividends.

The 1949 plan provided, among other things, that the new class A stock should be entitled to dividends of 5 percent in any year before any dividends are paid or declared and set apart for payment on the class B stock. It also provided that, after dividends of \$5 have been paid or declared on both class A and class B stock, the former should participate equally, share for share, with the latter in any further dividends. The examiners did not recommend any change in these provisions.

Under the agreed plan, we must determine whether the class A stock should be paid to dividends annually at \$4 or \$5 per share, and the participation feature provided in the 1949 plan would be eliminated. Considering the nature of this class A stock, and the statements of earnings elsewhere in this report, we have no doubt that it should be entitled to dividends of 5 percent in any year before the class B stock receive any dividends. A lesser rate would not, in our opinion, fully compensate the old preferred-stock holders. The participation feature of this stock was incorporated in the 1949 plan to insure some compensation for possible failure to receive dividends in some years. But under the agreed plan these stockholders also will obtain control of the reorganized company. Appraisal of such control is difficult, but it is our view that it will afford some support for the price of the class A stock. Since the old preferred-stock holders receive new class A stock for the entire amount of the par value held plus unpaid dividends, we conclude that the participation feature of the latter is not necessary for compensation in full. Similarly, the rights of the class A stockholders upon liquidation should be limited to \$100 per share, eliminating the liquidation participation provided for this stock in the 1949 plan. We find that the above-described distribution to the old preferred-stock holders of new non-cumulative nonconvertible no-par value class A stock entitled to \$5 dividends annually, and to receive upon liquidation \$100 per share out of the assets of the reorganized company, would be fair and equitable and would compensate them fully for the rights surrendered.

Modification of the class A stock.—Under the agreed plan, the dividends on the class A stock would be noncumulative and nonconvertible and dividends would be limited to \$4 or \$5 per year as we may decide, without further participation in earnings. We herein have concluded in our discussion of the treatment of the old preferred-stock holders that a dividend rate of \$5 was necessary to compensate them for their rights. We also concluded that we should approve the elimination of the participation feature provided for this stock in the 1949 plan.

The agreed plan further would require that the certificate of incorporation of the new company provide that the company shall not alter or change the rights of the holders of either class A or class B stock, or authorize the issue of additional shares of either class of stock or of any other class, or of participating or convertible preferred stock, without the consent of the holders of at least a majority of the number of shares of common stock of each class at the time outstanding.

The groups contend that the provision of the agreed plan eliminating the new preferred stock places control of the new company in the new class A stock although the fact that such stock is noncumulative and nonconvertible would result in entire loss of income by the holders in years of low earnings and a resulting low market price for the stock. Such a type of voting security, they assert, would not promote the selection of the best, or a stable management, and they point out that the holders of the new first-mortgage bonds would be vitally interested in a stable and capable management. Considering the estimates of earnings upon which the examiners based their recommendations, we do not attach material significance to this criticism. We believe it impossible to reorganize the debtors in a manner equitable to all classes of security holders under a plan which would assure the new stockholders of a return in every year. This objection to the agreed plan is not sustained.

In accordance with our hereinbefore-stated findings, we conclude that the 1949 plan provision for class A common stock should be modified so that the annual dividends would be limited to \$5 in any year, without further participation in earnings in the same year. Provision for this stock should be further modified so that upon dissolution, winding up, or liquidation of the new company, it would be entitled to receive out of the assets of the company only \$100 per share, such distribution to be prior to any distribution to the class B stockholders. The limitation upon the issue of additional stock or the change of the rights of stockholders should be modified to conform to the agreed plan.

Modification of the class B common stock.—Under the plan recommended by the examiners, no class B common stock would have been

issued until the exercise of warrants, under prescribed conditions, by the old common-stock holders of Missouri Pacific. Under the agreed plan there would be 49,657.17 shares of no-par-value class B stock of \$100 stated value, or, in our discretion, 81,314.34 shares of a stated value of \$50 per share, all to be issued to the Missouri Pacific common-stock holders on the basis of 1 share for 20 old shares, or if \$50 stock is issued, 1 share for each 10 shares of the old stock. There would be no other limitation upon the dividends which might be declared and paid on this stock.

Under the agreed plan, the earnings per share of class B stock in a year when earnings available for interest and Federal income taxes are \$57.5 million, would be, with income tax at 45 percent, \$214 before all funds; nothing after all funds when the capital fund is increased to \$11 million, and \$31.97 when the ordinary capital fund is applicable. The last two figures reflect the deduction of the three-fourths of 1 percent sinking-fund payments.

The Missouri Pacific common-stock holders' committee alludes to the large per share earnings on this stock and contends that, because of the reduction in number of shares outstanding, the public market will be destroyed and holders will be able only to sell their scrip and odd lots wherever they can find a buyer. It foresees a public distribution of less than 22,000 shares since it says that 19,000 shares will go to a single holder.² It points out that the plan would vest the equity in a class of stock having only 2 percent of the voting power, while control of the property will be in the hands of the other 98 percent. To protect the public holders of the class B stock, the committee requests recognition of them as a separate class, by the issue to them of new stock on a share-for-share basis. The circumstances recited by the committee do not, in our opinion, justify the recognition of the public holders of the new class B stock as a separate class of security holders. Some relief would be accorded them by approval of the issue of the larger number of shares of \$50 stated value stock, but the doubling of the voting power that would result, we believe, would be inequitable. The agreed plan provides 1 vote for each share of class B stock.

We conclude that we should approve modification of the class B stock provided for in the 1949 plan to conform to the agreed plan, using \$100 stated value stock and distributing to the old Missouri Pacific common-stock holders 1 share of new class B stock for each 20 shares of old stock. We find that such treatment would be fair and equitable.

² On the basis of the record before us, Alleghany Corporation would receive 1 share for each 20 shares of its holdings of 396,000 shares, or 19,800 shares.

provisions of subsection (e) of section 77 of the Bankruptcy Act, as amended, and of section 208 (b).

We conclude and find that, upon the record previously made in this proceeding and as supplemented by further hearings held pursuant to the provisions of section 208, the 1949 plan of reorganization should be modified in accordance with the findings and conclusions set forth in this report, and that as thus modified the plan will be fair and equitable and in the public interest and compatible with the provisions of section 208, title 11, U. S. Code, and of section 77 of the Bankruptcy Act. The plan so modified is hereby approved and will be certified to the United States District Court for its approval.

All requested findings and proposed modifications of the 1949 plan not specifically discussed in this report, or upon which no finding is made herein, have been duly considered, and they are found not justified to the extent that they are not incorporated in this report and in the modifications of the plan as herein approved.

An appropriate supplemental order will be issued.

MAHAFFIE, Commissioner, concurring in the result:

These properties have been in trusteeship for many years. Much work has been done and much expense has been incurred as a result of that fact which would not have had to be done or incurred in private management. A plan which appears to have the approval of most of those interested is now presented. This plan has been worked out and is urged in the hope that it can be made effective promptly. It greatly increases debt over the figures of the prior plan or of that proposed by the examiners. For enduring financial health a very much larger proportion of the value of the property represented by the securities issued than will be the case here must be held by owners with a right to vote, rather than by creditors. This, no matter how little of what ordinarily are considered creditors' rights, the latter possess. Under this plan the debt represented by the debentures is debt in not much more than name. Its creation, however, leaves little of value in the property to be represented by the controlling stock. This is not sound. But it is a direct result of what appears to be the national policy to put a premium on debt as against an equity interest in such properties. And that policy naturally makes for unsound capital structures. In this case the prospective saving to the company at the expense of the United States Treasury is enormous.

Another serious defect is the proposed "B" stock. This is intended to give recognition to the old common. That common has, at most, only a nuisance value if the claims prior to it are to be fully met. It is proposed to award to it only a small amount in actual par value but

to make it the residuary beneficiary of any future prosperity the property may enjoy. The prior class "A" stock is limited as to dividends and is noncumulative. It will be largely of a speculative character for some years at best. But the "B" stock is for the present, and for the foreseeable future, principally valuable as a token for speculation. Consequently, its relation to the "A" stock and to the debentures and income bonds which precede it is reasonably sure to cause trouble.

In view of these facts the problem we must face is whether the public interest in the reorganization of these properties and their return to private operation without prolonged further delay and expense outweighs the obvious defects of this agreed plan. On the whole I think it does. Accordingly, although with grave misgivings, I concur in the result.

COMMISSIONERS FREAS and TUGGLE concur in the result.

COMMISSIONER ARPAIA was necessarily absent but if he had been present he would have voted for the adoption of the report.

COMMISSIONER WINCHELL did not participate in the disposition of this case.

290 I. C. C.

1956, to the extent earned in the preceding calendar year. Interest shall be mandatorily payable to the extent that available net income is sufficient for the payment thereof; and all interest not paid because of this limitation shall be noncumulative. Interest on the debentures to the extent so earned in each calendar year shall become owing as a debt on December 31, in such year, even though not payable until April 1, in the next succeeding year. If, in any year, interest on the debentures is not covered by available net income, such interest may, in the discretion of the board of directors of the reorganized company, be paid out of any funds lawfully available therefor.

The debentures shall be redeemable as a whole or in part on any interest payment date, on 30 days' notice, at their principal amount plus (a) all unpaid interest earned thereon to the end of the calendar year preceding the date of redemption and (b) interest at the rate of 5 percent per annum from the end of such calendar year to the redemption date, whether or not such interest is earned. Upon maturity, whether by acceleration or otherwise, the debentures shall be entitled to (a) all unpaid interest earned thereon to the end of the calendar year preceding the date of maturity plus (b) interest at the rate of 5 percent per annum from the end of such calendar year to the date of maturity, whether or not such interest is earned. All interest on the debentures after maturity shall be a fixed obligation.

Q. New common stock, class A and class B.—The common stock of the new company shall be divided into two classes, one of which shall be designated as class A and the other of which shall be designated as class B, each of which shall be without par value but shall have a stated value of \$100 per share. The number of shares in each class to be authorized in the certificate of incorporation of the new company shall be fixed by the reorganization managers in relation to the requirements of the plan, and the number of shares in each class to be originally issued shall be in the amounts necessary to carry out the plan. The certificate of incorporation shall permit the authorization from time to time of additional shares of common stock of either class, but shall specifically provide that the new company shall not alter or change the rights of holders of either class of stock or authorize the issuance of additional shares of either class or of any other class or of participating or convertible preferred stock, without the consent of the holders of not less than a majority of the number of shares of common stock of each class at the time outstanding.

Dividends on the class A common stock shall be limited to \$5 a share in any calendar year, irrespective of the amounts which may have been paid on the class B common stock. Dividends on the class A stock shall be noncumulative and none shall be paid in the form of stock or notes or in any form other than cash or its equivalent. In any calendar year, no dividends on class B stock shall be declared or paid unless, during that year, dividends of \$5 per share shall have been paid or declared and set apart for payment on the class A stock, but there shall be no other restriction on the amount of dividends which may be declared and paid on the class B stock.

Class A common stock shall be nonconvertible, and, in the event of dissolution, winding up, or liquidation of the new company, the holders of this class of stock shall be entitled to receive out of the assets of the new company \$100 per share before any distribution is made to the holders of class B common stock, who thereafter shall be entitled to receive any further distributions out of the assets of the new company, without further participation by holders of class A stock.

Each class of common stock shall have full voting rights, and each share of stock shall entitle the holder thereof to one vote. Stockholders shall have the right of cumulative voting in the election of directors.

290 I. C. C.

Allegheny's interest in the Plan of Recapitalization or Settlement

was self interest in order to stay under the jurisdiction of the I.C.C. as a motor carrier in order to save 70% annually in I.R.S.

penalty taxes. This was opposite to the interest of Petitioner Class B stockholder and in opposition to the interest of the U.S. Government.

The \$349,192,000 Retained Income that belong to Class B equity bearing Common Stock, and the \$545 million in consolidated nondepreciable properties including land and land rights also belonging to class B as of December 31, 1972, amounts to \$894 million, which when divided by 39,731 shares of Class B amounts to \$22,500 value per Class B. But B is getting \$2,450 value per share, or about \$97 million total

Corp. at \$2,450 per Class B amounts to over \$400,000,000 in value that Mississippi short changed Alleghany, all because Alleghany was petitioned and pressured by the I.C.C. to divest themselves of their Class B securities if Alleghany wanted to remain in the status of a motor carrier under the jurisdiction of the ICC and thus save themselves from an annual 7% IRS penalty tax which it seems to me Alleghany did not want to pay, so Alleghany decided to remain as a motor carrier under the ICC jurisdiction by obeying the ICC to divest themselves of their Class B MoPac securities, and to whom but to Mississippi, which company in 1966 conspired to merge MoPac with the T. & P. by giving Class B a value of only \$100 per share. Honorable Justice of the United States Supreme Court Mr. Black said that this was like trading 4 rabbits for a horse, when this case was tried in the 1966 October Term, Case #359. Mississippi is trying to get Class B in a different way this time. (Read Pages 339 and 350 ¹⁰⁴⁴ #MC-F-Alleg. Corp. Jones Mot)

The ICC has the expertise and should evaluate Class B under due process of law, according to the I.C.C. MoPac Agreed System Plan of Reorganization of 1954. Not only is Alleghany being short changed by the ICC not evaluating the Class B under the Agreed System Plan, but the ICC is trying to rope in the minority Class B Stockholders also in this shameful deal. I blame the ICC for this shameful act, because whatever the others in the case could have done wrong, they may have done it with the idea that if what they had done was wrong, then the ICC would correct it according to ICC rules of expertise evaluation according to the Agreed System Plan of Reorganization. For one reason or another the ICC did not use their expertise to evaluate Class B as it was their sworn duty to evaluate Class B. So the stockholders of Alleghany were short changed over \$400 million in value. The capital gains taxes that would have been paid to the U.S. Government if the ICC had done their duty would have been enormous. This could have been of no business to the minority Class B Stockholders if they also were not roped in in this shameful deal. But now it is the business of the minority Class B to solve this matter by having the Class B evaluated according to the MoPac ICC Agreed System Plan of Reorganization of 1954, so that Class B gets a true value of \$22,500 per share in relation to the Class A \$5 preferential stock, which has a value in liquidation of only \$100 per share. Where does Class A get to pay off Class B with a value of only \$2,450 per share out of Class B's own values, because Class A is a sort of a preferred stock, when Class B has a value of its own of \$22,500 per share, and keep the rest of the values? Correct this.

Respectfully submitted,
James C. Gabriel Pro Se
James C. Gabriel Pro Se
P.O. Box 94, Sea Girt, N.J.
(201) 899-6200 (08750)

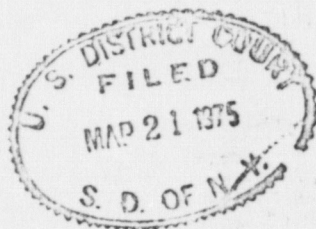
Sworn before me this 19th day
March 1975

VINCENTIA M. JONES
Notary Public, State of New York

3/19/75 PETITIONERS MOTION IS HEREBY DENIED.

SO ORDERED:

Edward J. [Signature]
U.S.D.J.



RECEIVED
MAR 21 1975

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 ----- X
4 BETTY LEVIN, et al., :

5 Plaintiffs, :

6 v. :

7 MISSISSIPPI RIVER CORP., et al., :

8 Defendants. :
9 ----- X

67 Civ. 5095

10 BEFORE: HON. EDWARD WEINFELD, D. J.

11 March 19, 1975

12 11:00 A. M. - Room 706

13
14 APPEARANCES:

15 JAMES C. GABRIEL,
16 Plaintiff pro se

17 DONOVAN, LEISURE, NEWTON & IRVINE,
18 Attorneys for defendants

19 BY: M. LAUCK WALTON, ESQ. Of Counsel.

1 elcg

2

2 (Case called.)

3 MR. GABRIEL: Your Honor, I am the plaintiff
4 pro se in this case. I have had this document --

5 THE COURT: State your name for the record.

6 MR. GABRIEL: James C. Gabriel.

7 THE COURT: Your address?

8 MR. GABRIEL: R.D. #1, Box 16, the address now
9 is Post Office Box 94, Colt's Neck, New Jersey.

10 Your Honor, I've had this class B, since 1949.
11 I was instrumental in going to St. Louis, Missouri and
12 helping bring this case back to Washington from the District
13 Court. I was instrumental in getting the property values
14 raised 290 million dollars through Mr. Bowles, the
15 director of finance. That was in '51 or '52, I believe. I
16 was lobbying in the senate and house for several years to
17 pass this bill to give the old common recognition. I have
18 met this case for many years, your Honor, and it insults my
19 intelligence to see that the plan of reorganization that
20 was submitted to the ICC in 19-- not by the ICC, rather, in
21 1954, PD9018 was not followed in this plan to the organiza-
22 tion.

23 THE COURT: This is water over the dam. You have
24 just handed me a copy of the second supplemental report of
25 the commission that goes back to 1954.

1 eleg

3

2 MR. GABRIEL: That is the plan of reorganization,
3 your Honor. That is where the value of the class B gets --

4 THE COURT: Why go back to 1954? Why don't you
5 get down to essentials here? Were you a participant in the
6 proceedings that followed after our approved settlements
7 here?

8 MR. GABRIEL: Yes, your Honor, I was here every
9 session you had.

10 THE COURT: What is new in the case? What are
11 the new things before this court and the ICC?

12 MR. GABRIEL: The new things in this court, your
13 Honor, is the fact that they haven't evaluated this stock
14 under due processes of law according to the ICC agreed plan
15 of reorganization of 1954, thereby shortchanging this stock
16 of the Mississippi River -- I mean, shortchanging the
17 Allegheny Corporation 20,000 dollars a share, which means
18 that 20,000 shares they have shortchanged the company
19 \$400,000,000.

20 I wouldn't mind if they did that, your Honor,
21 if I wasn't involved. But they involved me as a stockholder
22 to give up my stock at the same point that they were
23 forcing Allegheny Corporation to give it up, even though
24 Allegheny had a --

25 THE COURT: Did you appear in connection with the
proposed settlement that was submitted to me?

1 elcq

2 MR. GABRIEL: I came down here but I wasn't --
3 I wanted an evaluation of my stock on the --

4 THE COURT: Why don't you answer my question? Did
5 you participate in the hearing before me when the proposed
6 plan of settlement was submitted?

7 MR. GABRIEL: The same day that you had the hear-
8 ing January 25, 1973, your Honor, I came down and I protested.
9 And I gave an equity studies of the securities and I said that
10 in this particular plan of recapitalization it will take
11 away 61 percent of the equity of the B stockholders and give
12 it to the A stockholders, who have no right to it because
13 they --

14 THE COURT: I referred to that, did I not, in
15 my opinion?

16 MR. GABRIEL: Yes, your Honor. That was my
17 contention. My contention --

18 THE COURT: What's new?

19 MR. GABRIEL: The thing new is this, that they
20 have shortchanged not only the --

21 THE COURT: That was your argument before.

22 MR. GABRIEL: No, sir. They have shortchanged
23 the government also for \$400,000,000 in values which the
24 government should have gotten at least capital gains tax
25 out of it. We as individual stockholders, we are be obliged

1 elc

5

2 to give up our stock because Allegheny had self interests to
3 be a motor carrier under the Jones Motor Company, sought to
4 get a less taxes on their annual taxes which saved them about
5 70 percent annually, as a motor carrier under the ICC's
6 jurisdiction.

7 I don't go along with that, your Honor. It hurts
8 me, your Honor, to see that these things can go on without
9 the advice or the consultation of the minority stockholders
10 whether or not it's agreeable to them. But the thing goes
11 from your hands, your Honor, to the ICC and the ICC, who has
12 the expertise to evaluate the stock under the due process of
13 law, they merely rubber stamp the whole thing and said this
14 is fair.

15
16 Why, your Honor, don't they have that plan of
17 reorganization in their hands which each stock has all the
18 equity of the corporation remaining after the \$5 have been
19 paid to the A stock, plus a hundred dollars liquidating
20 value, which amounts to \$22,500 a share? They know it.
21 we protest it, but they rubber stamped the whole thing.
22 They had a five day hearing. And your Honor, it makes me
23 feel as if the courts should be told these truths before
24 this thing happened, that was the situation as it was.

25 The ICC plan of reorganization should be followed
to the T, your Honor, in order to get these small stockholders

1 elcg

6

2 who have one or two or three or five shares their rough
3 proper value, because these people hit the jackpot. There is
4 millions of acres of land in coal, oil, coke, oil shale,
5 gas and all that. The B stock earned last year over \$1300
6 a share, which is a lot of money.

7 Now, they have got a retained income of 349
8 million as of December 31, 1972, plus 545 million dollars in
9 property values and in land and land values, which have more
10 than doubled and tripled in the last few years, your Honor.
11 And it makes me feel that if Mr. Young was alive, which he
12 isn't, or Mr. Kirby, who had died just a couple of years ago,
13 whenever it was, he would never have accepted this plan.
14 But I was working with him in the House of Representatives and
15 the senate for so many years, your Honor, and it's terrible
16 to see the thing just fall apart just because there aren't
17 people to defend this thing from the people who are trying to
18 take advantage from the sickness of Mr. Kirby, who became ✓
19 ill and died later, or the fact that Mr. Young was another
20 defendant.

21 Your Honor, there should be a re-evaluation --
22 I was a pro se stockholder, I should have my stock evaluated. ✓
23 I am not part of the case, the class action. I never came
24 into this class action and said I go along with it. They
25 have no right to rope me in and tell me you have to accept

1 elcg 7

2 this. What happens to the property owners in this country
3 if that is the case, your Honor? We have no way of redress,
4 then.

5 The Court, you yourself, your Honor, should see
6 to it that we as stockholders, which there is only a few
7 remaining, should get their stock evaluated by due process
8 of law according to the re-organization of 1954.

2 9 Mr. Young fought for this and Mr. Kirby fought
10 for this for years. They spent millions. Why don't they
11 at least follow it now that it is important to be followed?
12 Why should the Allegheny Corporation stockholders be short-
13 changed \$400,000,000? That's a lot of money, your Honor.
14 It may not seem so much because they say well, this is a
15 plan of recapitalization, we'll take it. But did they
16 evaluate under due process of law to find exactly what it was
17 worth? They didn't.

18 Now, there is a reason for it, your Honor because
19 they were in a hurry, maybe financially or otherwise, I
20 don't know what it was. But the ICC told them that if you
21 want to remain as a motor carrier under the ICC's jurisdiction
22 you must invest yourself of your class B stock at our dis-
23 cretion. They have the jurisdiction over their stock for
24 years because of the fact that they had them under the ICC
25 jurisdiction as a motor carrier.

1 elcq

8

2 That way they were able to save several million
3 dollars a year in taxes, Allegheny did. But why does that
4 interest us? The fact that they didn't get their evaluation
5 the way they should have gotten it, it becomes our business
6 because we are roped into the same deal and we don't want to
7 be roped into the same deal, your Honor.

8 We want to have this thing evaluated and done
9 in a proper way. And your Honor knows that the method that
10 should be done.

11 THE COURT: Are you finished?

12 MR. GABRIEL: Yes, your Honor.

13 MR. WALTON: Your Honor, I believe that most of
14 the points in opposition are covered in the papers. I'd
15 like to report to your Honor that yesterday the plaintiffs
16 filed a petition for certiorari in the Supreme Court of
17 your last set of denial in the same trial. In addition, your
18 Honor, you denied the plaintiffs motion for new trial and
19 the Napoleon Gabriel's motion for new trial and both of those
20 have been affirmed off the bench by the Second Circuit. They
21 have now taken a petition for certiorari.

22 I hand you this document. I only received it
23 yesterday.

24 THE COURT: Who is Napoleon C. Gabriel?

25 MR. GABRIEL: Your Honor, that is my brother.

1 eleg

2 He has five shares of Class B. He's had it since 1949 or
3 '52, I don't remember. But I believe that the thing can
4 be corrected by this court right here to evaluate the stock
5 under due process of law.

6 MR. WALTON: Your Honor, I think you find that
7 the first three questions are identical with the first four
8 questions here. I will just submit, your Honor, that he
9 asserts he owns 120 shares of class B stock, which are worth
10 more than a quarter of a million dollars. He asserts in his
11 position that he owns 120 shares of the old class B which we
12 evaluated in the settlement offer at 22,450 dollars a share,
13 about a quarter of a million dollars in this stock alone.
14 I would respectfully submit that we are never going to see
15 the end of this litigation unless you give the plaintiffs/
16 respondents costs on motions like these.

17 MR. GABRIEL: Your Honor, everytime we hollered
18 police, they are hurting us, or they are robbing us, we have
19 to pay costs. How can we get help, your Honor --

20 THE COURT: You haven't paid costs yet, and the
21 defendants have urged that this is really a motion utterly
22 without substance because it's been made before. Apparently
23 as I have read the papers, what you argue here is no different
24 than what has been presented by Napoleon C. Gabriel, who you
25 say is your brother; in that case there was representation

1 elcg

10

2 by an attorney. Isn't that correct?

3 MR. WALTON: That is correct, Your Honor.

4 THE COURT: This matter has been disposed of.
5 I'm not going to listen to the same arguments again and
6 again. You have an avenue of appeal. The matter was heard
7 by the Court of Appeals once, it's been heard by the Court
8 of Appeals twice.

9 MR. GABRIEL: Your Honor, I am taking this case
10 to Court per se. I want my stock evaluated.

11 THE COURT: You had a full opportunity to present
12 whatever argument you desired to present to the Court on
13 previous occasions. You were heard, you were present.

14 MR. GABRIEL: I wasn't part of the case. I
15 realize now that the thing should be started now that the
16 thing should be started from here, from the source, and
17 have it evaluated under due process of law, according to the
18 Missouri-Pacific Agreed Plan of re-organization of 1954, which
19 gives the A stockholders only \$100 value, liquidated value
20 plus \$5 when and if earned and declared by the directors.
21 And the rest of the property belongs to the B stockholders.
22 That thing has not ever been resolved your Honor. We have
23 always been pushed around and I for one have come back to
24 see your Honor, but I want you to look at this thing closely.

25 THE COURT: You will not come back again except

1

alcy

11

2

under different conditions. I am going to deny this motion

3

as frivolous and a rehash of motions that have previously

4

been made, in the Court's view made by this plaintiff appear-

5

ing pro se who with knowledge of the previous motions. I

6

am going to deny the request made by the defendant, which I

7

regard as a proper one, that costs be imposed, because you

8

are appearing for the first time pro se. But I am giving

9

notice to you now, and notice to any other applicant, that

10

a similar application will be denied because there is no

11

substance to it, and will be denied with the imposition of

12

substantial costs.

13

MR. GABRIEL: Your Honor, can I have a word with

14

you?

15

THE COURT: No, we have ended the argument. I

16

gave you the time you wanted. You have a right to appeal

17

from this order.

18

MR. GABRIEL: Thank you, your Honor.

19

MR. WALTON: Thank you.

20

21

22

23

24

25

I (the) hereby certify that the foregoing is a true and accurate report of the proceedings in the above captioned case, as the same were reported to me by the stenographer of this court.

Official Court Reporter
U. S. District Court

United States District Court
Southern District Of New York

6/3
Betty Levin, Alleghany Corporation,
and Robert LeVasseur,

Plaintiffs,

v.

Mississippi River Corporation,
Missouri Pacific Railroad Company,
Robert H. Craft, T.C. Davis and
Thomas F. Milbank,

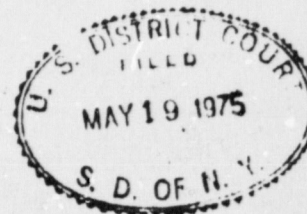
Defendants.

67 Civ. 5095 (EW)

Notice Of Motion To Re-open

The Above Case In The

United States District Court



Sir:

PLEASE TAKE NOTICE that the undersigned Petitioner James C. Gabriel, appearing Pro Se, will move this Honorable Court at the Court House Foley Square, New York, N.Y. in Room 2204 thereof, on the 3rd day of June, 1975, at 2:15 P.M. o'clock or as soon thereafter as Petitioner, Pro Se, may be heard, before the Honorable Edward Weinfeld, U.S.D.J., for an order (a) to reopen the above captioned case; (b) that Petitioner requests an oral argument to be heard; (c) and for granting such further relief as to this Honorable Court seems just and proper, for reasons set forth in annexed petition.

Yours, etc.,

James C. Gabriel
James C. Gabriel, Pro Se,
Petitioner.

Dated: May 19, 1975
P.O. Box 94
Sea Girt, New Jersey 08750
(201) 893-6200

and Robert LeVasseur,

Plaintiffs,

-against-

Mississippi River Corporation,
Missouri Pacific Railroad Company,
Robert H. Craft, T.C. Davis and
Thomas F. Milbank,

Defendants.

: Affidavit In Support

: Of Motion

:

:

:

:

x

State Of New Jersey
County of Monmouth

James C. Gabriel, Pro Se, being duly sworn, deposes and says:

1) That he is the Appellant Pro Se in the above captioned case.

2) That this Honorable Court of Justice in its Order and Final Judgment dated and entered May 2, 1973, retained "jurisdiction of all matters respecting the consummation of the settlement of this action pursuant to the Stipulation of Settlement and for the purposes of entertaining applications for attorney's fees and expenses by counsel for Plaintiffs Betty Levin and Robert LeVasseur and by Plaintiff Alleghany Corporation.

3) That annexed hereto and made part of this affidavit are two copies of Satisfaction of Judgment, #74,567, Filed April 18, 1975, 1) "in favor of Orans, Elsen & Polstein, a partnership, and Pomerantz Levy Haudek & Block, a partnership, jointly and not severally, and against Mississippi River Corporation and Missouri Pacific Railroad Company, jointly and not severally, in the sum of \$1,750,000.00, plus disbursements of \$22,422.06, for a total of \$1,772,422.06, which judgment was docketed on July 3, 1974 in the office of the Clerk of the Southern District of New York and said judgment has been paid." 2) "in favor of Alleghany Corporation and against Mississippi River Corp. and Missouri Pacific Railroad Company, jointly and not severally, in the amount of \$850,000, which judgment was docketed on July 3, 1974 in the office of the Clerk of the Southern District of New York and said judgment has been paid," Filed April 22, 1975, U.S. District Court, S.D. of N.Y.

4) That James C. Gabriel, Appellant Pro Se, found out about

Judgment of Honorable Edward Weinfeld's Court approving the same, such fees were to be settled only "after such final judgment is no longer subject to appeal."

5) That at the time of the "Satisfaction Of Judgment" dated April 17, 1975 and April 21, 1975, final judgment was still "subject to appeal," a) an appeal - a Petition For A Rehearing Of Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit was pending, and was Received on May 9, 1975 by the Office of the Clerk, Supreme Court, U.S., in the Supreme Court Of The United States, March Term, 1975, #74-1171; B) Appellant James C. Gabriel's Case #75-7241 in the United States Court Of Appeals, Second Circuit, was being appealed; c) three appellants in New Jersey had Civil Actions pending in the United States District Court, District of New Jersey, by William R. Wesson, Pro Se, Plaintiff, Civil Action #74-469; John Charles Vaiani, Pro Se, Plaintiff, Civil Action #74-470; James C. Gabriel, Pro Se, Plaintiff, Civil Action #74-471; vs. United States Of America and Interstate Commerce Commission, Defendants, and Missouri Pacific Railroad Co., Intervening Defendant, who are fighting the Interstate Commerce Commission's Authority granted to Missouri Pacific Railroad Company to issue new Securities under Section 20a, Finance Docket #27346, (because it also defrauds U.S. Gov't. - more than \$100 million in taxes) Service Date December 14, 1973, by Commission Division 3, whereby Commission Division 3 is evading its duty to evaluate Class B equity bearing Common Stock according to the I.C.C. "Agreed System Plan" of Reorganization of MoPac, Finance Docket #9918, of 1954-55, (Class B undervaluation costing Government over \$100 million in taxes) called MoPac's Charter, which gives Class B all residuary values, and all dividends after \$5 per Class A Preferential Stock, with only a liquidating value of \$100 per share has been satisfied for the Class A; the remainder values accruing to the Class B, which amounted to approximately \$22,500 value per Class B as of December 31, 1972.

I am protesting payment of these fees to these lawyers for the fact case is still subject to appeal, and secondly they should not get paid for betraying Class B unlawfully, and for only a fraction of Class B's real value. Not \$2,450, but \$22,500 value per Class B. Sworn to before me this May 19, 1975

Sworn to before me
19 Day of May 1975

James C. Gabriel, Pro Se
Notary Public, State of N.Y.
No. 24-0032315, qualified
in Kings County, Cert filed
in New York County

ORIGINAL
RECEIPT FOR PAYMENT

FOR THE SECOND CIRCUIT

Received
7/10/01

James C. Lafferty

NAME: _____

P.O. Box 94 Sea View, N.J. 08750

(ADDRESS)

75-7341

Betty Leri v. Miss. River Corp.

(SHORT TITLE)

4-21-75

DATE _____

ACCOUNT

AMOUNT

Clerk's Fee for docketing case

57 | 107

*Viscous fees

Certified copy of

Copy of Opinion

Certificate of admission

Copy of Court Rules

Clerk ☐

TOTAL

50	82
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Deputy Clerk ☐

Cler. Asst.

32808

RECEIVED
MAY 9 1975

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Court of the United States

MARCH TERM, 1975

No. 74-1171

OFFICE OF THE CLERK
SUPREME COURT, U.S.

NAPOLEON C. GABRIEL and MICHAEL MOUMOUSIS, as CLASS B
STOCKHOLDERS in MISSOURI PACIFIC RAILROAD COMPANY,
for themselves and all others similarly situated,

Petitioners-Appellants.

—v.—

BETTY LEVIN, on behalf of herself and all other holders of
CLASS B COMMON STOCK of MISSOURI PACIFIC RAILROAD
COMPANY, and on behalf of said corporation, and ROBERT
LEVASSEUR and ALLEGHANY CORPORATION,

Plaintiffs-Appellees,

—against—

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD
COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS
MILBANK,

Defendants-Appellees.

**PETITION FOR A REHEARING OF PETITION FOR
A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

GERARD M. CAREY

*Attorney for Napoleon C. Gabriel and
Michael Moumouis*

Office and P. O. Address

617 Third Street

Brooklyn, New York 11215

Telephone 212 SOuth 8-0009

United States District Court
Southern District Of New York

Betty Levin, Allegheny Corporation, x
and Robert LeVasseur :

Plaintiffs, :

-against- :

Mississippi River Corporation, :
Missouri Pacific Railroad Company, :
Robert H. Craft, T.C. Davis and :
Thomas F. Milbank, :

Defendants x

67 Civ. 5035 (EW)

Notice Of Appeal

APR 11 4 41 PM '75

Sirs:

Please Take Notice that James C. Gabriel, on behalf of himself appeals to the United States Court of Appeals, Second Circuit, the final judgment of the Federal District Court of New York Southern District, docketed and entered on March 21, 1975 in the above captioned action and appeals each and every prior order and decision of the said court which supports the said judgment.

Dated: April 11, 1975

Respectfully,

James C. Gabriel, Pro Se

James C. Gabriel, Pro Se
Petitioner
P.O. Address 64, Box 94
Sea Girt, New Jersey 08750
(201) 869-8200

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WILLIAM R. WESSON, pro se,
Plaintiff,

vs.

Civil Action # 74-469

UNITED STATES OF AMERICA, et al,
Defendant.

JOHN CHARLES VAIANI, pro se,
Plaintiff,

vs.

Civil Action # 74-470

UNITED STATES OF AMERICA, et al,
Defendant.

JAMES C. GABRIEL, pro se,
Plaintiff,

vs.

Civil Action # 74-471

UNITED STATES OF AMERICA, et al,
Defendant.

Thursday, December 4, 1974
Camden, New Jersey

Before the Honorables:

HON. JAMES HUNTER, III, Circuit Court Judge
HON. LAWRENCE A. WHIPPLE, Chief, USDJ
HON. CLARKSON S. FISHER, USDJ

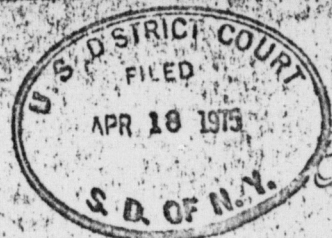
Appearances:

WILLIAM R. WESSON, pro se, (Civ. # 74-469)
JOHN CHARLES VAIANI, pro se, (Civ. # 74-470)
JAMES C. GABRIEL, pro se, (Civ. # 74-471)

JONATHAN L. GOLDSTEIN, United States Attorney
For the Government.

BY: RICHARD W. HILL and RONALD L. REISNER, AUSA's

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



BETTY LEVIN, ALLEGHANY CORPORATION,
and ROBERT LeVASSEUR,

Plaintiffs,

-against-

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT, T. C. DAVIS and
THOMAS F. MILBANK,

Defendants.

67 Civ. 5095 (EW)

SATISFACTION OF
JUDGMENT

74,567

WHEREAS, a judgment numbered 74,567 was entered in the above entitled action on July 2, 1974 in favor of Orans, Elsen & Polstein, a partnership, and Pomerantz Levy Haudek & Block, a partnership, jointly and not severally, and against Mississippi River Corporation and Missouri Pacific Railroad Company, jointly and not severally, in the sum of \$1,750,000.00, plus disbursements of \$22,422.06, for a total of \$1,772,422.06, which judgment was docketed on July 3, 1974 in the office of the Clerk of the Southern District of New York and said judgment has been paid.

AND it is certified that there are no outstanding executions with any Sheriff or Marshal within the State of New York, and that said judgment has not been docketed in any other state,

THEREFORE, entire satisfaction of said judgment is hereby acknowledged, and the said Clerk is hereby

authorized and directed to make an entry of entire satisfaction on the docket of said judgment.

Dated: April 17, 1975.

ORANS, ELSÉN & POLSTEIN

By Sheldon H. Elsen
(A Member of the Firm)
One Rockefeller Plaza,
New York, N.Y. 10020
(212) JU 6-2211

POMERANTZ LEVY HADEK & BLOCK

By Walter Knecht
(A Member of the Firm)
295 Madison Avenue,
New York, N.Y. 10017
(212) 532-4800

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 17th day of April, 1975, before me personally came Sheldon H. Elsen, personally known to me and to me known to be a member of the firm of Orans, Elsen & Polstein and to me known to be the person described in and who executed the foregoing satisfaction of judgment in the firm name of Orans, Elsen & Polstein and he acknowledged that he executed the same as the act and deed of said firm for the uses and purposes therein mentioned.

Deborah Esther Marks

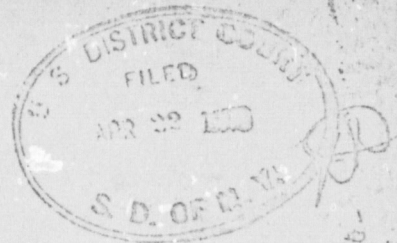
DEBORAH ESTHER MARKS
Notary Public, State of New York
No. 31-4327892
Qualified in New York County
Commission Expires March 30, 1976

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 17th day of April, 1975, before me personally came William E. Haudek, personally known to me and to me known to be a member of the firm of Pomerantz Levy Haudek & Block and to me known to be the person described in and who executed the foregoing satisfaction of judgment in the firm name of Pomerantz Levy Haudek & Block and he acknowledged that he executed the same as the act and deed of said firm for the uses and purposes therein mentioned.

Irving Maxon
IRVING MAXON
NOTARY PUBLIC, State of New York
No. 41-7772030
Qualified in Queens County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- x
BETTY LEVIN, ALLEGHANY CORPORATION
and ROBERT LEVASSOR,

Plaintiffs,

-against-

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CHART, T. C. DAVIS and
THOMAS F. MILBANK,

Defendants.
----- x

:
: 67 Civ. 5095 (EW)

:
: SATISFACTION OF
: JUDGMENT

:
: Judgment No. 74,567

WHEREAS a judgment numbered 74,567 was entered in the
above entitled action on July 2, 1974 in favor of Alleghany
Corporation and against Mississippi River Corporation and
Missouri Pacific Railroad Company, jointly and not severally,
in the amount of \$850,000, which judgment was docketed on July 3,
1974 in the office of the Clerk of the Southern District of New
York and said judgment has been paid.

AND it is certified that there are no outstanding exe-
cutions with any Sheriff or Marshal within the State of New York
and that said judgment has not been docketed in any State court
nor registered in any other United States District Court.

THEREFORE, entire satisfaction of said judgment is
hereby acknowledged, and the said Clerk is hereby authorized
and directed to make an entry of entire satisfaction on the
docket of said judgment.

Dated: April 21, 1975

DONOVAN LEISURE NEWTON & IRVINE

By: 

(A Member of the Firm)

Attorneys for Alleghany Corporation
30 Rockefeller Plaza,
New York, New York 10020
(212) 489-4100

(Corporate Seal)

ALLEGHANY CORPORATION

By

W. C. Horton

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

On the 21st day of April, 1975, before me personally came M. Lauck Walton, personally known to me and to me known to be a member of the firm of Donovan Leisure Newton & Irvine and to me known to be the person described in and who executed the foregoing satisfaction of judgment in the firm name of Donovan Leisure Newton & Irvine and he acknowledged that he executed same as the act and deed of said firm for the uses and purposes therein mentioned.

Constance Fedder

CONSTANCE FEDDER
Notary Public, State of New York
No. 41-4519904 Qual. in Queens Co.
Commission Expires March 30, 1976

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

On the 21st day of April, 1975, before me came JARED C. HORTON, to me known, who, being by me duly sworn, did depose and say that he is the VICE PRESIDENT of Alleghany Corporation, the corporation described in, and which executed the foregoing satisfaction of judgment; that he knows the seal of said corporation; that the seal affixed to said satisfaction of judgment is such corporate seal; that it was so affixed and that he signed his name thereto as an officer of said corporation by virtue of authority conferred by said corporation.

Carol Stark

CAROL STARK
Notary Public, State of New York
No. 31-6156585
Qualified in New York County
Commission Expires March 30, 1976

United States District Court
Southern District Of New York



Betty Levin, Allegheny Corporation, : 67 Civ. 5095 (EW)
and Robert LeVasseur, :
Plaintiffs-Respondents, : Affidavit In Opposition
: To Affidavit Of Roger W.
: Haudek, associated with
: Pomerantz Levy Haudek &
: Block, the attorneys for
: plaintiff Robert LeVasseur.
Mississippi River Corporation, : This Captioned Case is to be
Missouri Pacific Railroad : Re-Opened Primarily to Aid
Company, Robert H. Craft, T.C. Davis : The U.S. Government Internal
and Thomas F. Milbank, : Revenue Service From Being
Defendants-Respondents, : Defrauded Out Of Over
James C. Gabriel, Pro Se, : \$100 Million in Taxes.
Petitioner. :
X

State Of New Jersey)
County Of Monmouth) ss.:

James C. Gabriel, Pro Se, Petitioner, deposes and says, under o
1. I am the Petitioner in the above captioned case. I submit
this affidavit in opposition of the affidavit of Roger W. Haudek,
associated with Pomerantz Levy Haudek & Block, the attorneys for
plaintiff Robert LeVasseur, who is opposed to my re-opening the
above captioned case on the ground that plaintiffs' counsel fees
have been paid although the settlement, according to me the
Petitioner, Pro Se, is still subject to appeal. The settlement is
still subject to appeal, and it is at the present moment being 1)
appealed by James C. Gabriel, Pro Se, Petitioner, in the United State
Court of Appeals, Second Circuit, Case #75-7241; at the present 2)
moment is being appealed by Michael Moumouis and
Napoleon C. Gabriel, as Class B Stockholders in Missouri Pacific
Railroad Company, for themselves and all others similarly situated
in a Petition for a Rehearing of Petition for a Writ of Certiorari
to the United States Court of Appeals, for the Second Circuit,
Received on May 9, 1975, Office of the Clerk, Case #74-1171, Supreme
Court of the United States, March Term; 3) three appellants in N.Y.
have Civil Actions pending in the United States District Court,
District of New Jersey, by a) William R. Hession, Pro Se, Plaintiff,
Civil Action #74-469; b) John Charles Valent, Pro Se Plaintiff, Civil

Action #74-470; c) James C. Gabriel, Pro Se, Plaintiff, Civil Action #74-471; all these Civil Action Cases against United States of America and Interstate Commerce Commission, Defendants, and Missouri Pacific Railroad Company, Intervening Defendant, who are still fighting the Interstate Commerce Commission's Authority granted to the Missouri Pacific Railroad Company to issue new Securities under Section 20a of the Interstate Commerce Act of 1940 without first evaluating Class B equity bearing Common stock under due process of law under the MoPac I.C.C. "Agreed System Plan" of Reorganization of 1954-1955, now a law of the United States, Finance Docket #9918, which "Agreed System Plan" of Reorganization or MoPac Charter gives Class B equity bearing Common a value of approximately \$22,500 per share, whereas the Court and the I.C.C. without proper evaluation under MoPac's Charter or "Agreed System Plan" of Reorganization said that a value of \$2,450 per Class B was "Fair Value," even though Class B stockholders are being forcefully made, by the Court with the sanction and authority of the I.C.C. Division 3, to lose approximately \$20,000 value per share. But this Commission Division 3's Authority granted to MoPac, without a true value of Class B equity bearing Common stock according to MoPac's Charter or "Agreed System Plan" of Reorganization of 1954-1955, defrauds the United States Government of more than \$100 million in taxes, in addition to the fact that all Class B stockholders are being defrauded out of over \$20,000 in value per Class B share. If the Class Action on dividends and conspiracy as Ordered by Honorable Frederick van Pelt Bryan on October 9, 1968 had not been convoluted into a Plan of Recapitalization 4 years later, on December 18, 1972, this never would have happened. The judgment of the Court cannot be defended and upheld when by a procedural device of a Class Action, a wealthy Corporation-Alleghany, was given only limited authority to represent the minority Class B Stockholders in a Federal suit for better dividends. Later, Alleghany abandons its trust and the suit, and by the aid of a Court judgment, usurps this ownership rights and claims ownership rights over the private property of the stockholders it represents. Alleghany sells the stocks of Class B at an arbitrary price without the right of the Class B stockholders

the "Agreed System Plan" of Reorganization or Charter of MoPac, even though the minority Class B Common Stockholders have asked the Interstate Commerce Commission and the Court to have the I.C.C. evaluate the Class B Common and find its true value according to the MoPac ICC "Agreed Plan of Reorganization." Instead of this, the dissident minority Class B Stockholders are made to fight a lot of court actions brought about by those who are supposed to have been our friends in this Class Action on dividends, but who have abandoned their trust as stated as above. This is a most dangerous precedent. It abuses Federal procedure and undermines the substantive rights of the owners of private property to be secure in his rights of ownership under the Constitution and laws of the United States. More important still, this unconstitutional action becomes a vehicle to help defraud the United States Government of over \$100 million in capital gains taxes, because the Class B equity bearing property was undervalued by not evaluating it according to MoPac's Charter of 1954-1955.

2. This application is not patently frivolous. It involves almost ONE BILLION DOLLARS IN VALUES, AND MOST ~~PROBABLY~~ OVER TWO BILLION DOLLARS IN VALUES. It does not attempt to vacate the judgments approving the settlement or the awarding of counsel fees if the judgments approving the settlement or the awarding of fees were made whereby Class B equity bearing Common Stock was evaluated according to the MoPac Interstate Commerce Commission's "Agreed System Plan" of Reorganization of 1954-1955 whereby Class B was evaluated under due process of law, to find its real and true value. The "Agreed System Plan" of Reorganization was the reason why Alleghany Corporation under Mr. Robert R. Young and Allen Kirby spent millions of dollars to bring it about, so as to give the old MoPac Common stock its real status as the equity bearing stock of the Missouri Pacific Railroad Company. Are any of you gentlemen adverse to MoPac's Charter by the I.C.C. as formulated in 1954 and 1955, and which became effective in 1956? Is it patently frivolous when it is said that the value of \$2.450 per Class B is "Fair Value" when Class B has a value in excess of \$22,500 per share, thus defrauding the U.S. Government over

\$100 million dollars in taxes, in this "Plan of Recapitalization"
under Section 20a. These are used to defraud Class B and the Gov't.

3. Enough is enough. Petitioner has a real grievance of what has been going on. It may be all right if the common ordinary stockholder is being short changed over \$20,000 per Class B or from \$615 million to \$797 million, but this undervaluation at the same time also defrauds the United States Government over \$100 million in taxes that the United States Government would have collected if the Class B equity bearing Common stock had been evaluated according to the MoPac I.C.C. "Agreed System Plan" of Reorganization, or MoPac Charter, which is also a law of the United States. Petitioner is not harassing anyone. Petitioner, Pro Se, is helping justice and morality and law and the Constitution of these United States of America take over to straighten out this mixed up case. Petitioner, Pro Se, should be rewarded thankfully for bringing up a way for a just solution of this most important case whereby he is volunteering to help the United States Government collect these huge taxes by having Class B stock evaluated under due process of law. I had previously asked the Interstate Commission several times in the process of a hearing before the I.C.C. in Washington, D.C. on September 17-21 before Honorable Judge Gibbon, but the I.C.C. apparently had other ideas. It is never too late, because this case is still being appealed in the Federal Courts. If I am to be made to pay counsel fees of \$200 to partially compensate for the costs of defending this motion because I bring up the matter of the United States Government being defrauded out of over \$100 million in taxes, besides the Class B Stockholders being short changed out of hundreds of millions of dollars in values in the process, is something that the people in Washington, D.C. would like to hear about. My Motion and Affidavit and Petition should be accepted with joy because it will bring a helpful and welcome solution, or at least it will help towards a solution of this MoPac case. The I.C.C. should do its duty and evaluate Class B under the "Agreed System Plan" of 1954.

on Robert LeVasseur, Alleghany Corporation, and Betty Levin, for not giving information, that has misled this Court, especially by Alleghany Corporation in its episode with the Jones Motor Company, which it purchased for over \$28 million in order to become a motor carrier under the jurisdiction of the I.C.C. in order to save penalty taxes of over 70% annually, or several million dollars per year, and later Alleghany Corporation, under pressure of the I.C.C. to divest itself of its MoPac Class B securities if it wished to remain as a motor carrier under the jurisdiction of the I.C.C., was willing secretly to relinquish its trust position of representing Petitioner and other Class B stockholders, to dispose its Class B equity bearing stock to Mississippi River Corp. at the bargain price of \$2,450 per Class B share. This Jones Motor Company episode was not included in the Proxy Statement dated May 8, 1973 for the Notice Of Special Meeting Of Stockholders, June 15, 1973. Apparently Alleghany did not want this information known either by the Court or by the minority Class B stockholders, and this was very misleading to all concerned. In addition, Robert LeVasseur, Alleghany Corporation and Betty Levin had no business convoluting the Class Action on dividends and conspiracy as Ordered by Honorable Frederick van Pelt Bryan U.S.D.J. into a Plan of Recapitalization when the pleadings were on dividends and conspiracy originally. This has cost the Class B equity bearing Common Stockholders a loss of over \$20,000 per Class B. This \$20,000 loss per Class B should be assessed against Alleghany Corporation, Robert LeVasseur and Betty Levin.

5) This loss of \$20,000 per Class B to every Class B stockholder should be assessed against Alleghany Corporation, Robert LeVasseur and Betty Levin. They coralled every Class B Stockholder on a Class Action based on dividends and conspiracy pleadings by Order of Honorable Judge Bryan on October 9, 1968, with no interveners permitted after December 20, 1968. When on December 18, 1972 this Action was changed into a "Plan of Recapitalization," they should have protested openly this change whereby the Class B Stockholders were being coralled into a boxed canyon where they were being fleeced of over 69% of the value of their Class B property. But not one word of protest by any of them was spoken. This silence on their part was a tacit acknowledgment on their part that whatever was being done to the Class B Stockholders, to the loss of Class B property values of over \$615 million, consisting of Retained Income and property values of lands and mineral rights of millions of acres of lands that contain valuable minerals of coal, gas, oil, etc., was agreeable to them. Therefore they are responsible, and I am therefore asking this Honorable Court to assess Alleghany Corporation, Robert LeVasseur and Betty Levin \$20,000 per Class B for each and every Class B whose value was reduced to \$2,450 instead of its real value of \$22,500 per share, according to the real true value of Class B as brought out in MoPac's Charter or "Agreed System Plan" of Reorganization of 1954-1955 as approved and certified both by the I.C.C. and the U.S. District Court in Saint Louis in 1955. (See 290 I.C.C. 1177). In addition, the I.C.C. is also responsible for not evaluating Class B according to MoPac's Charter that the I.C.C. made in 1954, and which it was their sworn duty to do. Besides, I and other Dissident Class B holders have petitioned the ICC for such an evaluation in Sept., 1973 Hearings in Washington, D.C. Sept. 17-21, 1973.

6) It appears to me that Mr. Robert LeVasseur had a conflict of interest, in this Missouri Pacific Railroad case. In addition to several hundred shares of Class B (336 Shares of Class B as of Record May 1, 1973), Mr. LeVasseur I believe had also several hundred shares of Class A, most probably much more than several hundred shares, probably in the thousands of shares of Class A Stock. I cannot recall the exact amount, even though I looked at the A Stockholders List in Saint Louis when I went to the Stockholders meeting in 1973, in the MOPAC Building.

7) So far as I know, Mr. LeVasseur did not vote his 336 Shares of Class B in this "Plan of Recapitalization," of 1973, according to the Stockholders Certified List of Class B Common Stock of the Missouri Pacific Railroad Company as of Record May 1, 1973, prepared by The Boatmen's National Bank of Saint Louis, Transfer agent.

8) So far as I know, Betty Levin did not have any shares of B stock at the time of the "Plan of Recapitalization," because the Certified List of Class B Common Stock of Stockholders of the Missouri Pacific Railroad Company as of record May 1, 1973, did not list Betty Levin as a stockholder. For that reason, her Attorneys, Orans, Elsen & Polstein, should not collect any Attorney fees on the above captioned case.

9) This Captioned Case is being re-opened primarily to aid the U.S. Government Internal Revenue Service from being defrauded out of over \$100 million in taxes. The "Plan of Recapitalization" and the Section 20a of the Interstate Commerce Act have become a vehicle which helps defraud the Government out of these huge taxes, unless Class B equity bearing Common Stock is evaluated under due process of law to find its true real value under MoPac's I.C.C. Charter or "Agreed System Plan" of Reorganization of 1954-1955, Finance Docket #9918,290 I.C.C. 477.

7.9. Retention of Jurisdiction by Court. Upon the entry of the judgment referred to in Section 1.5 hereof, the Court shall nevertheless retain jurisdiction of the matter to supervise the consummation of the settlement and for the purpose of awarding the fees and allowances referred to in Section 7.10. If the settlement is not consummated, any party may move to reopen the judgment and no party shall oppose such application.

7.10. Fees of Counsel. After the entry of a final judgment by the Court approving the terms of settlement contained herein, and after such final judgment is no longer subject to appeal, Plaintiffs and/or counsel will apply to the Court for allowances of fees and expenses, including fees and disbursements of attorneys, accountants and experts; and Defendants will not oppose the granting of such allowances as in their judgment are reasonable. Any such allowances shall be paid by MoPac and MRC.

CERTIFIED LIST OF

CLASS B COMMON STOCK

STOCKHOLDERS OF

MISSOURI PACIFIC RAILROAD COMPANY

As of Record MAY 1, 1973

PREPARED BY

THE BOATMEN'S NATIONAL BANK
OF SAINT LOUIS

TRANSFER AGENT

THE BOATMEN'S NATIONAL BANK

OF ST. LOUIS Shares Voted

Vote
Instructions

STOCKHOLDER	FOR	AGAINST	NUMBER	SHARES	YES	NO
RALPH J. LAWRENCE 73-370 ROYAL PALM DR PALM DESERT CALIF 92260	2		451	2		
LAZARD FRERES & CO 1 ROCKEFELLER PLAZA NEW YORK N.Y. 10020	60		452	60		
MRS HELEN P. LEACH 604 LAUREL AVE PT PLEASANT BEACH N.J. 08742		2	453	2		
LEHMAN BROS 1 WILLIAM ST NEW YORK N.Y. 10004			454	101		
MELVIN LEIBOWITZ 25 HOLLY HILL RD WILMINGTON DEL 19809	10		455	10		
M. B. LEIDER 1600 FAIRMOUNT AVE PHILADELPHIA PA 19130	10		456	1		
ALYCE L. LESSER 8035 SEMINOLE PL CLAYTON MO 63105	15		457	15		
✓ MRS LOUISE KING LE VASSEUR WESTWOOD ROAD WOODBURY CONN 06798	1		458	1		
✓ ROBERT LE VASSEUR			459	336		

Wherefore, it is respectfully submitted that the motion of James C. Gabriel, Pro Se, Petitioner, to re-open the above captioned case should not be denied and that counsel fees of \$200 should be denied and not be assessed in favor of counsel for plaintiff LeVasseur against petitioner James C. Gabriel, that this Honorable Court assess Alleghany Corporation, Robert LeVasseur and Betty Levin \$20,000 per Class B for each and every Class B whose value was reduced to \$2,450 instead of its real value of \$22,500 per share, according to the real true value of Class B as brought out in MoPac's Charter or "Agreed System Plan" of Reorganization of 1954-1955, that payment of fees to the attorneys should not be allowed because the above captioned case is still subject to appeal, and secondly, fees to these attorneys should not be paid for selling out the Class B equity bearing Common Stock for only a small fraction of Class B's real value, which is not the \$2,450 value given to each Class B, but a value of \$22,500 per Class B, that the Class B equity bearing Common stock be evaluated under due process of law according to the MoPac Charter developed by the MoPac "Agreed System Plan" of Reorganization, ICC Finance Docket #9918, thus enabling the U.S. Government Internal Revenue Service to realize capital gains taxes of over \$100 million which have been avoided in spite of pleas by Petitioner and other minority Class B Stockholders to the United States Federal Courts and to the I.C.C. for a proper evaluation of Class B according to MoPac's "Agreed System Plan" of Reorganization of 1954-1955, that Robert LeVasseur has a conflict of interest in that he had a substantial number of Class A \$5 Preferential \$100 liquidating stock while he was acting as Plaintiff who possessed 336 shares of Class B which is another reason why his attorneys-Pomerantz Levy Hauderk & Block should not receive any fees, and that Plaintiff Betty Levin had sold her Class B stock before the "Recapitalization Plan" was in being, which is another reason why Orans, Elsen & Polstein should receive no fees, because her name is not on the May 31, 1973 certified MoPac Stock list.

Sworn to before me this
2nd day of June, 1975

Walter A. Fisher
Walter A. Fisher

Notary Public
My Commission
Expires 7/13/78

James C. Gabriel, Pro Se
James C. Gabriel, Pro Se,
Petitioner

Service to:

Clerk, U.S. District Court, S.D., Foley Square, N.Y.N.Y.

Honorable Edward Weinfeld, U.S.D.J.

Orans, Elsen & Polstein
One Rockefeller Plaza, N.Y.N.Y. 10020

Donovan Leisure Newton & Irvine
30 Rockefeller Plaza, N.Y.N.Y. 10020

Pomerantz Levy Haudek & Block
295 Madison Ave.
N.Y.N.Y. 10017

Sullivan & Cromwell
48 Wall Street, N.Y.N.Y. 10005

Dewey, Ballantine, Bushby, Palmer and Wood
140 Broadway
N.Y.N.Y. 10005

Gerard M. Carey
Office and Post Office Address
617 Third Street
Brooklyn, N.Y. 11215

I hereby certify that I have deposited postage prepaid, a copy of
affidavit on the above captioned case. *James C. Gabriel, Pro Se*
James C. Gabriel, Pro Se,

Subscribed and sworn
before me this 27th
day of June 1975

John Archon Notary Public
My Commission
Expires 7/23/78

United States District Court
Southern District Of New York

Betty Levin, Alleghany Corporation
and Robert LeVasseur,

Plaintiffs-Respondents,

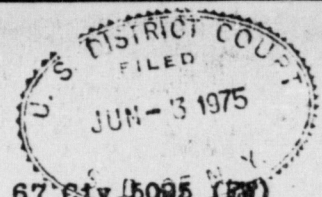
-against-

Mississippi River Corporation,
Missouri Pacific Railroad Company,
Robert H Craft, T.C. Davis and Thomas
F. Milbank,

Defendants-Respondents.

James C. Gabriel, Pro Se,

Petitioner.



67 Civ. 5095 (EW)
Affidavit in Opposition
To Affidavit Of
Marcia B. Paul of
Sullivan & Cromwell.
This Captioned Case is
being Re-opened
Primarily to Aid The
U.S. Government Internal
Revenue Service From
Being Defrauded Out Of
Over \$100 Million In
Taxes.

State Of New Jersey)
:ss.:
County Of Monmouth)

James C. Gabriel, being duly sworn, deposes and says:

I am the Petitioner in the above captioned case.

I submit this affidavit in opposition to the affidavit of
Marcia B. Paul, dated May 29, 1975, a member of the Bar of this Court, and
associated with the firm of Sullivan & Cromwell, attorneys for the
defendants Missouri Pacific Railroad Company, (MoPac), Robert H. Craft
and T.C. Davis in the above captioned case.

The motion of petitioner James C. Gabriel, dated May 19, 1975,
for an order "reopening" this case, petitioner's request for an oral
argument to be heard, and for granting such further relief as to this
Honorable Court seems just and proper, for reasons set forth in the
annexed petition.

In the annexed petition it was stated that this Honorable
Court of Justice in its Order and Final judgment dated and entered
May 2, 1973, retained "jurisdiction of all matters respecting the con-
summation of the settlement of this action pursuant to the
Stipulation of Settlement and for the purposes for entertaining
applications for attorney's fees and expenses by counsel for
plaintiffs Betty Levin and Robert LeVasseur and by plaintiff Alle-
ghany Corporation."

That two copies of Satisfaction of Judgment were filed,
#74-587, Filed April 18, 1975 "in favor of Orans, Elsen & Polstein,

a partnership, and Pomerantz Levy Haudak & Block, a partnership, and against Mississippi River Corporation and Missouri Pacific Railroad Company, in the sum of \$1,750,000 plus disbursements of \$22,422.06, for a total of \$1,772,422.06, which judgment was docketed on July 3, 1974 in the office of the Clerk of the S.D. of New York and said judgment has been paid. Also in favor of Alleghany Corporation and against Mississippi River Corp. and Missouri Pacific Railroad Company, in the amount of \$850,000, which judgment was docketed on July 3, 1974 in the office of the Clerk of the S.D. of New York and said judgment has been paid-Filed April 22, 1975, U.S.D. Court, S.D. of N.Y.

But by the Stipulation of Settlement, and the Opinion and Judgment of Honorable Weinfeld's Court approving the same, such fees were to be settled only "after such final judgment is no longer subject to appeal."

7.10. Fees of Counsel. After the entry of a final judgment by the Court approving the terms of settlement contained herein and after such final judgment is no longer subject to appeal, Plaintiffs and/or counsel will apply to the Court for allowances of fees and expenses, including fees and disbursements of attorneys, accountants and experts; and Defendants will not oppose the granting of such allowances as in their judgment are reasonable. Any such allowances shall be paid by MoPac and MRC.

That at the time of the "Satisfaction of Judgment" dated April 17, 1975 and April 21, 1975, final judgment was still "subject to appeal," a Petition for a Rehearing of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit was pending, and was received on May 9, 1975 by the Office of the Clerk, Supreme Court, U.S., in the Supreme Court of the U.S., March Term, 1975, Case #74-1171; appellant James C. Gabriel's Case #75-7241 in the U.S. Court of Appeals, Second Circuit, was being appealed; three appellants in New Jersey had Civil Actions pending in the U.S. District Court of New Jersey, by William R. Wesson, Pro Se, Plaintiff, Civil Action #74-469; John Charles Vaiani, Pro Se, Plaintiff, Civil Action #74-470; James C. Gabriel, Pro Se, Plaintiff, Civil Action #74-471, vs. U.S.A. and I.C.C., Defendants, and Missouri Pacific R.R. Company, intervening Defendant, who are fighting the I.C.C.'s Authority granted to MoPac to issue new Securities under Section 20a, Finance Docket #27346, Service date December 14, 1973, by Commission Division 3, whereby Commission Division 3 is evading its duty to evaluate Class B equity bearing Common Stock according to the ICC "Agreed System

Class B to be undervalued. It is given a value of \$2,450 per share, where as according to the "Agreed System Plan" of Reorganization of 1954 it has a value of approximately \$22,500 per share. This undervaluation is costing the U.S. Government over \$100 million in taxes, aside of what it is costing the Class B holders, which I estimate to be from \$615 million to \$797 million, as of Dec. 31, 1972. Commission 3's Authority granted to MoPac to issue new securities under Section 20 a , F.D. #27346, for the "Plan of Recapitalization" of 1973, without evaluating Class B under MoPac's Charter or "Agreed System Plan" of Reorganization of 1954-1955 undervalues Class B and defrauds the U.S. Government of more than \$100 million in taxes. This is what the whole MoPac case is all about. The U.S. Courts and the ICC will not evaluate Class B equity bearing Common Stock according to MoPac's Charter or Plan of Reorganization of 1954, because if they evaluate it under MoPac's Charter Class B will receive about \$22,500 per share in value, or 225 shares of new Common stock for each Class B, to 1 share of new Common Stock for each Class A, or a ratio of 225 to one. The minority Class B holders are roped in in a Class Action of Recapitalization which originally started as a Class Action on dividends and conspiracy pleadings by Order of Hon. F. van Pelt Bryan on October 9, 1968, and which became convoluted into a Class Action on Recapitalization from December 18, 1972. Class B minority Stockholders will never give in to such a conspiracy against their civil rights property rights, without due process of law evaluation of Class B according to MoPac's Charter of 1954.

In the process of this undervaluation, the United States Government is the loser of over \$100 million in taxes. In other words, whether you like it or not, the U.S. Federal Courts and the I.C.C. by not consenting to evaluating Class B under due process of law are helping to defraud the U.S. Government Internal Revenue Service of over \$100 million in taxes. Therefore, without an evaluation of Class B under due process of law, the "Plan of Recapitalization" of 1973 coupled with the Section 20a of the ICC, become a vehicle that help defraud the U.S. Government of many millions in taxes. The only solution to the problem is to evaluate Class B under due process., 290I.C.C.477, F.D.9918.

I completel disagree with Marcia B.Paul of Sullivan & Cromwell.Petitioner James C.Gabriel,Pro Se,is re-opening this above captioned Case primarily to aid the United States Government Internal Revenue Service from being defrauded out of over \$100,000,000 in taxes that the United States Government is losing because Class B is not being evaluated according to the MoPac I.C.C. "Agreed System Plan" of Reorganization of 1954-1955 which is the Charter of the Missouri Pacific Railroad Company. This "Agreed System Plan" of Reorganization of the Missouri Pacific Railroad Company is a law of the United States and it must be enforced because it was approved and certified by the ICC to the Federal District Court in Saint Louis,which in turn approved and certified it to the ICC in Washington,D.C. My reason for re-opening this above captioned Case is for the good of the United States Government Internal Revenue Service,to have the Internal Revenue Service recoup the many millions of taxes it has coming to it by having Mopac evaluated under due process of law.I am sure that the many millions of dollars that were spent by Mr. Robert R. Young and Mr. Allen Kirby to reorganize Mopac under the MoPac ICC "Agreed System Plan"of Reorganization must be used now to settle this prolonged MoPac Stockholders' dispute caused by greedy Mississippi and her majority Class A by having the U.S.Government Internal Revenue Service enter this case and get the huge taxes that a due process of law evaluation will give the U.S.Government.I am positive that all concerned would like to see the Government get this over \$100 millions that it has got coming to it,and I am sure that the Federal Courts would help the U.S.Government and do all they can to see that justice is done to the Government.

No decision has as yet been rendered by the United States Supreme Court for a Rehearing Petition that was submitted to it. Because the U.S.Supreme Court has many thousands of cases to consider and it cannot keep up with its heavy burder and hear all of them does not mean that those not heard had no merit.Far from it.

This Honorable Court should not deny the instant motion.The United States Government Internal Revenue Service must be helped by the U.S.Federal Courts to collect millions of dollars in taxes.

Petitioner has presented a basis on which the judgment should be re-opened. There is over \$two billions of values involved in this MoPac case, with its millions of acres of mineral rights that MoPac owns-coal, oil, gas, etc. other minerals. In 1974 Class B earned over \$1,300 per Class B on an I.C.C. accounting basis. The United States Government Internal Revenue Service must collect its rightful taxes. We can not allow Mississippi River and her majority of Class A get a free windfall of over \$400 million scott free, values that belong to Class B equity bearing Common stock, in addition to hundreds of millions of dollars windfall to the rest of the Class A or new cumulative preferred or the new common in which it is convertible into. There is a transfer of from \$615 million to \$797 million being transferred from the Class B equity bearing common stock to the preferred stock, and this over \$600 million must be taxed, which amounts to over \$100 million in taxes. Why do you call this frivolous? According to the Federal Rules of Procedure, in the interest of justice to protect the U.S. Government from such harassing tactics from such thoughtless unjust Defendants-Respondents who are making such a misuse of the judicial process, the United States Federal Courts must enforce the law against such connivers who are trying to help their clients to overcome the true meaning of justice, by having the Federal Courts warn such connivers that the Federal Government must collect the taxes due to the Federal Government, and that you cannot have a free ride into the dollar values of others without paying for it, in taxes to the Federal Government. No free rides, no conniving, or connivers.

Wherefore, it is respectfully submitted that the Affidavit of Marcia B. Paul and the Memorandum of Law in Opposition to Motion to Re-open the Judgment be denied for the sake of justice.

Sworn to before me this
3rd day of June, 1975

Respectfully,
James C. Gabriel, Pro Se
James C. Gabriel, Pro Se,
Petitioner.

VINCENT M. JONES
Notary Public, State of New York
Qualified in Nassau County
No. 41-1623003
Term Expires March 30, 1977

Service to:

Clerk, U.S. District Court, S.D., Foley Square, N.Y.N.Y.

Honorable Edward Weinfeld, U.S.D.J.

Orans, Elsen & Polstein
One Rockefeller Plaza, N.Y.N.Y. 10020

Donovan Leisure Newton & Irvine
30 Rockefeller Plaza, N.Y.N.Y. 10020

Pomerantz Levy Haudek & Block
295 Madison Ave.
N.Y.N.Y. 10017

Sullivan & Cromwell
48 Wall Street, N.Y.N.Y. 10005

Dewey, Ballantine, Bushby, Palmer and Wood
140 Broadway
N.Y.N.Y. 10005

Gerard M. Carey
Office and Post Office Address
617 Third Street
Brooklyn, N.Y. 11215

I hereby certify that I have deposited in the mail postage prepaid
a copy of affidavit of the above captioned case to all of the
above.

James C. Gabriel
James C. Gabriel, Pro Se.

D.V.C. NY
Sworn before me this 3rd day
of June 1977

Vincent M. Jones
VINCENT M. JONES
Notary Public, State of New York
Qualified in Nassau County
No. 41-1960000
Term Expires March 22, 1977

Service to:

Clerk, U.S. District Court, Southern District, Foley Square, N.Y.N.Y.

Honorable Edward Weinfeld, U.S.D.J.

Orans, Elsen & Polstein
One Rockefeller Plaza, N.Y.N.Y. 10020

Donovan Leisure Newton & Irvine
30 Rockefeller Plaza
N.Y.N.Y. 10020

Pomerantz Levy Haudek & Block
295 Madison Ave.
N.Y.N.Y. 10017

Sullivan & Cromwell
48 Wall Street
N.Y.N.Y. 10005

Dewey, Ballantine, Bushby,
Palmer and Wood
140 Broadway
N.Y.N.Y. 10005

I hereby certify that I have deposited in the mail postage prepaid,
a copy of motion and affidavit in support of motion.
May 18, 1975.

*Seen & before me
this 17 day of May 1975*

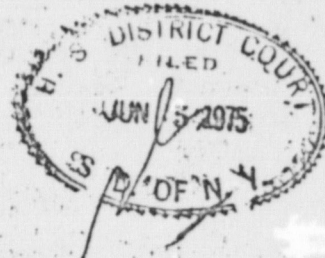
John B. [Signature]
Notary Public, State of N.Y.
No. 2400110, qualified
in New York County
in New York County
Comm. Expires March 30, 1977

James C. Gabriel, Pro
James C. Gabriel, Pro So.
Appellant

JUNE 3, 1975 PETITIONER GABRIEL'S MOTION TO RE-OPEN IS HEREBY
DENIED, COURT FINDS MOTION VEXATIOUS AND ORDERS
MOVANT TO PAY \$100.00 COUNSEL FEE, TO BE DIVIDED
AMONG OPPOSING COUNSEL.

SO ORDERED:

[Signature]
U.S.D.J.



1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X
4 BETTY LEVIN, et al., :

5 Plaintiffs, :

6 vs. : 67 Civ. 5095

7 MISSISSIPPI RIVER CORP., et al., :

8 Defendants. :
9 -----X

10 June 3, 1975
11 2:15 p.m.

12 BEFORE: HON. EDWARD WEINFELD, USDJ

13 APPEARANCES:

14 JAMES C. GABRIEL,
15 Pro Se Plaintiff

16 For Defendants:

17 SULLIVAN & CROMWELL, ESQS.
18 BY: Marcia B. Paul, Esq.

19 POMERANTZ, LEVY, HAUDEK & BLOCK, ESQS.
20 BY: Robert W. Haudek, Esq.

21 DONOVAN LEISURE NEWTON & IRVINE, ESQS.
22 BY: Steven Houck, Esq.
23
24
25

EXHIBIT

THE COURT: You may proceed.

MR. GABRIEL: By not evaluating out stock under due process of law, the government is the loser of over one hundred million dollars in taxes. In other words, whether you like it or not, the United States Federal courts and the ICC by not consenting to evaluate --

THE COURT: What are you reading from?

MR. GABRIEL: My text that I made up. I was up all night long trying to get these papers together and I am tired. I haven't slept over an hour.

The United States Federal courts and the ICC by not consenting to evaluate Class B under due process of law are helping to defraud the United States Government Internal Revenue Service of over one hundred million dollars in taxes. Therefore, without an evaluation of Class B under due process of law, the plan of recapitalization of 1973 coupled with the Section 20A of the ICC becomes a vehicle that helps defraud the United States Government of many millions dollars of taxes. The only solution to this problem is to evaluate Class B under due process of law; Mopac system plan of reorganization of 1954, finance docket 9918.

It seems to me that we have gone through the thing quite a bit. The idea of the government being defrauded

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2 was never brought up. I think the government has a right
3 to claim its taxes on the evaluation which was never consu-
4 mated. Our contention was always that we should have the
5 stock evaluated under due process of law, the agreed plan
6 of reorganization, and we have no response. We tried again
7 and again in different direction but we have no response.
8 We love your people, we think you are wonderful, but evaluate
9 our stock and say this is what it is worth under the agreed
10 plan of the ICC that was formulated in 1954.

11 We have no fight against you people. All we
12 been doing all these two years is evaluating. We have never
13 got a positive response either from the courts, the
14 supreme court or the ICC or anybody. Now that they realize
15 the government is also being defrauded out of millions of
16 dollars, it seems to worry them a bit.

17 It doesn't worry them at all when we are losing it.
18 Of course it doesn't because we are only stockholders, but
19 what about the government that has a claim on this, and,
20 furthermore, the time we had the hearing in Washington on
21 September 17 to 21, 1973, Mr. Vaiani who questioned Mr.
22 O'Leary, the vice president of finance of how is it possible
23 that they could not pay over five dollars a share in dividends
24 on the B stock but now with this plan, they could pay \$550
25 a share. So, Mr. O'Leary said we are borrowing the money,

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2 thirty-three million dollars to pay it, to pay these dividends
3 and John says how can you pay dividends when you borrow
4 money. He says that is not dividends. That is return of
5 capital but nevertheless, in the proxy statement, it says
6 it is a dividend where we as stockholders will have to pay
7 seventy percent in income taxes whereas Alleghany Corporation
8 who took it as a dividend is only paying fifteen percent
9 taxes.

10 THE COURT: That is part of the argument made in
11 opposition to the approval of a settlement and you are going
12 over matters that were argued before, considered on appeal
13 and you are just repeating matters presented to this court
14 any number of times.

15 MR. GABRIEL: I didn't mean to repeat something. I
16 am not so smart. I didn't know that was true, but it struck
17 me unusual when I read those minutes of the hearings we had
18 in Washington on September 17 to the 21st, that O'Leary said
19 that was dividends then he said it was return of capital and
20 Alleghany had to pay only fifteen percent whereas they should
21 have paid thirty-five percent.

22 The whole thing is so convoluted, we can't make
23 heads or tails out of it. We should have the stock evaluated.
24 There are only a few shareholders left anyway and if they
25 evaluate the stock under due process of law and try to

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2 straighten this matter out, I believe we will be on a very
3 amicable basis among the people who have been the defendants
4 and plaintiffs in this case.

5 THE COURT: Have you concluded?

6 MR. GABRIEL: It is the same old story. You can
7 conclude it in two paragraphs:

8 We want an evaluation under due process of law
9 according to the ICC plan of reorganization of 1954 which gave
10 the preferred stockholders only one hundred dollars value
11 and five dollars when and if declared and gave the common
12 stockholders, the B stockholders the equity of the corporation
13 which amounts to over \$22,500 a share which is made up of
14 three hundred forty-nine million in retained income and
15 five hundred forty-five million dollars in property values
16 and those property values could be four and five times more
17 but I will be conservative and forget about the difference.
18 We have a value of eight hundred ninety-four million
19 dollars and divided by 39,731 shares, we have a value of
20 \$22,500. That means 225 shares of new stock for every B
21 stock in relation to \$100 of the preferred which is one share.

22 We should get 225 shares against their one but
23 instead, what are they giving us? They are giving us \$850
24 a share in cash and \$15 a share in relation to \$22,500.
25 That is a pretty big windfall. The government should

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collect those taxes and if they had evaluated the stock as we had asked them in the beginning, there wouldn't have been such confusion on this issue.

Your Honor, I feel for you because you hear these things over and over again and I know how you feel but it worries me no end that we couldn't get some decision in a way we can compromise this matter and try to straighten this thing out in an amicable way like the ICC had brought it out in 1954.

Mr. Young and Mr. Kirby spent millions of dollars to bring about this plan of reorganization under the re-system plan and it is a shame we couldn't have gotten together under that agreed plan of reorganization to come to an amicable agreement among ourselves but instead they come out with a class action on dividends, they changed it to recapitalization then we start asking about having it evaluated and we don't get any wheres. We go to the Supreme Court twice. The Supreme Court case is now on a rehearing on the basis that the government is being defrauded out of this money and this windfall money should not be given to the Alleghany Corporation. It was gaining between four and five hundred million dollars out of this deal and the rest of the stockholders, the Class A stockholders are getting about \$700,000,000. There should be no windfall against anybody without the

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2 government participating and collecting those taxes and it
3 is our money they are taking away without compensation to the
4 B stockholders. That is what worries me.

5 We can get this thing straightened out under
6 the agreed system plan of reorganization and we could term-
7 inate that way.

8 THE COURT: Who is in opposition to this motion?

9 MISS PAUL: Marcia Paul of Sullivan, Cromwell. I
10 speak on behalf of all plaintiff-respondents and defendant-
11 respondents.

12 We agree with your Honor's statement and find
13 there is absolutely nothing raised upon this motion by
14 Mr. Gabriel that has not been raised numerous times before.
15 There is no merit to any of the argument.

16 A certain amount of finality should be afforded
17 a judgment which has been before this Court over and over
18 again and before other courts and we feel something should
19 be done to stop the stream of motions to reopen, vacate or
20 modify the judgment in one form or another.

21 THE COURT: What do you think should be done
22 to stop the stream of motions?

23 MISS PAUL: We propose or suggest to your Honor
24 that perhaps you could order that each additional motion
25 which is submitted to this court be treated as one for

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rehearing or a reargument of motions previously submitted

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and decisions previously been made and as such, the parties

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respondents would not have to file answering papers and

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the Court would not have to entertain oral argument unless

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your Honor would so direct.

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THE COURT: That would be an encouragement for

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further motions to be made.

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MISS PAUL: I don't believe it would be encourage-

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ment for further motions.

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THE COURT: You are asking to be relieved of

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filing counter affidavits. How would that stop the making

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of additional motions?

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MISS PAUL: I believe that the petitioner's --

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I don't question their motives or beliefs or the efficacy of

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their own arguments but I do believe they feel they have

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a forum in which they could come and take this Court's time

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and the parties time and numerous counsel present and make

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their arguments heard again and again and again when these

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arguments are the same arguments and perhaps if this forum

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were denied them and at the same time the time of both counsel

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and the Court could be shortened, it would be of benefit to

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all concerned.

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THE COURT: Who else is here in opposition?

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MR. HAUDEK: Roger Haudek, I am associated with

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Pomerantz, Levy, Haudek and Block. We are attorneys for
LeVasseur.

Our position here is to request attorneys fees
assessed against the petitioner for his frivolous motion
and we hope this way he will be discouraged.

THE COURT: What attorneys fees do you think
will be reasonable?

MR. HAUDEK: We have asked for \$200 for this
particular motion.

MR. HOUCK: My name is Steven D. Houck from
Donovan, Leisure, Newton & Irvine, for Alleghany.

I would aslo request costs. On Mr. Gabriel's
last motion, I believe your Honor told him if he appeared
again before you you would assess him substantial costs.

THE COURT: Did you file opposing affidavits?

MR. HOUCK: We didn't on this motion.

THE COURT: Then all you are asking for is your
reasonable fees for appearance here today. You haven't
drafted any papers, have you?

MR. HOUCK: Miss Paul submitted papers on our
behalf.

THE COURT: Where are they?

MISS PAUL: There is a statement in my affidavit
to the extent that I am submitting the papers on behalf of

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all parties.

MR. GABRIEL: How could this be a frivolous case when there are hundreds of millions of dollars involved? We will never give up on this case until there is a resolution. The only way they could stop us is to put us in a concentration camp. We are not going to stop fighting for our equity because we haven't had a chance to show what it was worth.

You people should have at least the courage to say it should be evaluated. Why are you fighting us, putting costs on us? It is enough I am spending day and night trying to answer your affidavits and everything and wearing myself down. Why don't you people come out and try to settle this matter?

THE COURT: They are not going to settle it. You have your day in Court and you have made your statement. The fact you have made it doesn't mean that the Court has to agree with it.

I am satisfied this is a frivolous motion.

MR. GABRIEL: Why? The government has been defrauded out of one-hundred million dollars. Is that a frivolous motion, when the government has not gotten its taxes on this? That is not frivolous. It was a big case.

THE COURT: It was a big case when I had it and whether it is a big case or a small case, doesn't make the

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2 slightest bit of difference. It is entitled to the same
3 attention from the Court and it received the attention it
4 required. We are not going to argue any further. I have
5 heard enough on this motion unless you have something you
6 want to add that is different from what you said before.

7 MR. GABRIEL: If you evaluate the right way,
8 you will get the government to come in and get their taxes
9 but you are not evaluating, your Honor, you are giving us --

10 THE COURT: That was fully gone into on the
11 original motion with some stockholders claiming the shares
12 were worth \$25,000.

13 MR. GABRIEL: We are not claiming that. We
14 have given you facts. We got three hundred forty-nine
15 million in retained income and five hundred million dollars
16 in property value which are worth five, six times more than
17 that. The ICC has the expertise --

18 THE COURT: You go down to the ICC if you think
19 you are entitled to any more.

20 MR. GABRIEL: Our case is still pending. We
21 are fighting them on their plan of recapitalization. We
22 haven't stopped yet. We are still out in Jersey. They had
23 no right to give a consent on that amount -- they were
24 remiss in their duties. They should have gone and evaluated
25 it. Why didn't they do it? Alleghany Corporation had other

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interests. They didn't want an evaluation and in the mean-
time, we are stockholders losing almost 90 percent of our
equity. That is not right and these people ask to have you
put cost on me. Why, because I am fighting for my rights
secured by the constitution?

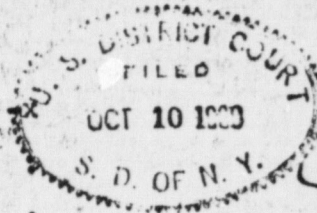
THE COURT: You asked for ten minutes. I asked
you if you had anything new to add and you are just repeating
your self. You had more than your ten minutes.

This is a motion made by the petitioner James C.
Gabriel appearing pro se. The motion is denied.

In view of the past history fo motions to
reopen this matter which were without substance, the Court
is of the view the motion is vexatious and an abuse of
process. The movent is directed to pay \$100 reasonable
counsel fees to those opposing the motion to be divided
equally among them.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



BETTY LEVIN, ALLEGHANY CORPORATION
and ROBERT LE VASSEUR,

Plaintiffs,

-against-

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD
COMPANY, ROBERT H. CRAFT, T.C.
DAVIS and THOMAS MILBANK,

Defendants.:

67 Civ. 5095

NOTICE OF
SETTLEMENT OF
ORDER

S I R S :

PLEASE TAKE NOTICE that an order, a true copy of which
is annexed hereto, will be presented for settlement and signature
by the Honorable Frederick van Pelt Bryan at the Office of the
Clerk, in Room 601 of the United States Courthouse, Foley Square,
New York, New York, on October 14, 1968 at 10:00 A.M.

New York, New York
October 9, 1968

Yours, etc.,

ORANS ELSSEN & POLSTEIN
Attorneys for Plaintiff
Betty Levin
Office & P.O. Address
10 East 40th Street
New York, N.Y. 10016

DONOVAN LEISURE NEWTON & IRVIN
Attorneys for Plaintiff
Alleghany Corporation
Office & P.O. Address
2 Wall Street
New York, N.Y. 10005

TO:

SULLIVAN & CROMWELL, ESQS.
Attorneys for Defendants
Missouri Pacific Railroad
Company, Robert H. Craft,
T.C. Davis and Thomas F.
Milbank
48 Wall Street
New York, N.Y. 10005

MICROFILM
OCT 10 1968

plaintiffs of said printed notices in envelopes; and it is further

ORDERED that the reasonable expenses of said mailing shall be borne jointly and severally by the plaintiffs; and it is further

ORDERED that defendant Missouri Pacific Railroad Company shall file an affidavit of mailing with the Court promptly after the aforesaid mailing, which affidavit shall contain the name and address of each person to whom the notice was mailed; and it is further

ORDERED that any member of the class desiring to
intervene in this action must, no later than December 2, 1968,
give notice of intention to intervene in the manner set forth in
the appended Notice, and thereafter must, no later than December
20, 1968, either obtain the consent of all parties to said
intervention or serve notice of motion for leave to intervene.

✓ Dated: New York, New York
October 7, 1968

Frederick van Pelt Bryan
Frederick van Pelt Bryan
U.S.D.J.

a majority of the Class B shares outstanding.

All plaintiffs sue on behalf of themselves and all other MoPac Class B stockholders. In addition, plaintiffs Betty Levin and Robert LeVasseur assert certain claims derivatively on behalf of MoPac.

Defendants are: Mississippi River Corporation (hereinafter referred to as "Mississippi"), holder of a majority of the outstanding Class A stock of MoPac; MoPac; Robert H. Craft and Thomas Milbank, both of whom are directors of Mississippi and MoPac; and T. C. Davis, a director of MoPac.

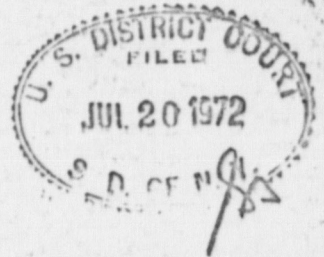
NATURE OF THE ACTION

This action was commenced by Betty Levin on December 29, 1967. Alleghany Corporation and Robert LeVasseur subsequently were, upon their motions, permitted to intervene as additional plaintiffs.

The complaints filed by all three plaintiffs charge, in substance, that dividends declared and paid by the MoPac board of directors on the Class B stock have been and are unreasonably and unjustifiably low; that Mississippi has misused its voting control over MoPac's board of directors in furtherance of a plan and conspiracy with said directors to improperly favor Mississippi and other Class A stockholders at the expense of the Class B stockholders; and that such conduct will continue unless enjoined by the Court. The complaints ask the Court to direct MoPac to pay reasonable dividends for past years to all Class B stockholders, plus interest thereon; that

WEINFELD, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- X
BETTY LEVIN,

Plaintiff,

ALLEGHANY CORPORATION,

Plaintiff-Intervenor,

ROBERT LeVASSEUR,

Plaintiff-Intervenor,

67 Civ. 5095 (EW)

AMENDED SUPPLEMENTAL
COMPLAINT OF INTER-
VENOR ALLEGHANY
CORPORATION

-against-

(Class Action)

MISSISSIPPI RIVER CORPORATION, MISSOURI
PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT,
T. C. DAVIS and THOMAS F. MILBANK,

Defendants.
----- X

Plaintiff-intervenor Alleghany Corporation ("Alleghany")
by its attorneys, alleges:

1. (a) This action was initiated on or about
December 29, 1967, by plaintiff Betty Levin, a citizen of the
Commonwealth of Massachusetts, on behalf of herself and all other
holders of Class B Stock of the Missouri Pacific Railroad
Corporation ("MoPac") and on behalf of MoPac.

(b) Defendant Mississippi River Corporation
(formerly known as Mississippi River Fuel Corporation and herein-
after called "Mississippi") is a corporation organized under the

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laws of the State of Delaware, with its principal place of business in the State of Missouri.

(c) Defendant MoPac is a railroad corporation organized under the laws of the State of Missouri, with its principal place of business in the State of Missouri.

(d) Defendants Robert H. Craft ("Craft"), T. C. Davis ("Davis") and Thomas F. Milbank ("Milbank") are citizens of the State of New York.

2. Plaintiff-intervenor Alleghany is a corporation organized under the laws of the State of Maryland. At all times complained of herein, Alleghany has been, and continues to be, the beneficial owner of a majority of the outstanding shares of Class B Common Stock of MoPac. Alleghany presently is the beneficial owner of 21,243 of the 39,731 shares of Class B Common Stock of MoPac outstanding.

3. Jurisdiction of the Court is based on diversity of citizenship of the original parties. The amount in controversy is in excess of \$10,000.

4. (a) This action is brought by plaintiff derivatively and by plaintiff and by plaintiff-intervenor on their own behalf and on behalf of all other holders of Class B Stock of MoPac.

(b) The Class B Stock of MoPac is owned by approximately 1200 persons, and joinder of all of them is impracticable. The complaints herein present questions of law and fact common to the entire class, and the claims contained in the complaints are typical of the claims of the class. The intervention as a plaintiff by Alleghany, the beneficial owner of more than 52% of the outstanding Class B Stock of MoPac,

insures that plaintiffs will fairly and adequately protect the interests of the class.

(c) The prosecution of separate actions by individual members of the class would create the risks of inconsistent or varying adjudications which would establish incompatible standards of conduct for defendants, and of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members of the class or substantially impair or impede their ability to protect their interests. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

(d) The complaints herein raise questions of law and fact common to the members of the class which predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Intervening Plaintiff's First Claim

5. At all times complained of herein:

(a) The capital stock of MoPac consists and has consisted of two classes, A and B.

(b) There have been outstanding approximately 1,850,000 shares of MoPac Class A stock and 39,731 shares of MoPac Class B stock; as of December 31, 1971, there were outstanding 1,864,052 shares of MoPac Class A Stock and 39,731 shares of MoPac Class B stock.

(c) In all respects but name, MoPac Class A Stock is and has been a preferred stock.

(d) MoPac Class A Stock is and has been limited (i) in its dividend rights to a preferential noncumulative dividend not to exceed \$5 per share in any calendar year, and (ii) in its right to share in the assets of MoPac in the event of liquidation to an amount not to exceed \$100 per share plus up to \$5 in dividends declared but not paid.

(e) MoPac Class B Stock is and has been the only common stock of MoPac entitled to unlimited participation in the earnings and equity.

(f) MoPac Class B Stock is and has been entitled to reasonable dividends out of MoPac's net income available for dividends after \$5 per share has been paid on the Class A stock in any calendar year.

(g) MoPac is and has been permitted to declare and pay dividends without limit as to amount on the Class B Stock out of net income available for dividends, after \$5 per share has been paid on the Class A Stock in any calendar year.

(h) In the event of MoPac's liquidation, the Class B Stock is and has been entitled to all earnings and assets of MoPac after payment of debts and the limited preferences of the Class A Stock, without further participation by the Class A.

6. (a) Pursuant to MoPac's charter, each share of Class A Stock and each share of Class B Stock is entitled to one vote for election of directors of MoPac.

(b) Pursuant to MoPac's charter, each class is entitled to a class vote on certain subjects (including any proposal to change or alter in any way the preferences, qualifications, limitations, restrictions or special or relative rights

of either class of stock), but is not entitled to a class vote for election of directors.

(c) At all times since 1962, defendant Mississippi has owned and presently owns in excess of 52% of the outstanding Class A Stock of MoPac, constituting a majority of all the outstanding voting stock of MoPac.

(d) By virtue of its said ownership since 1962 of a majority of the outstanding voting stock of MoPac, defendant Mississippi since 1962 has had and continues to have the power to elect its nominees to MoPac's Board of Directors.

(e) At all times since 1962, nominees of defendant Mississippi in fact have been elected to and presently constitute the entire MoPac Board of Directors.

(f) At all times since 1962, a majority of members of the MoPac Board of Directors also have been and presently are directors and/or officers of defendant Mississippi.

(g) By virtue of the foregoing, MoPac is and since 1962 has been controlled by Mississippi, which presently is the owner of more than 60% of MoPac's Class A Stock and of approximately 59% of MoPac's total voting stock.

7. (a) None of the members of the MoPac Board of Directors owns any MoPac Class B Stock.

(b) The members of the MoPac Board of Directors in the aggregate owned 9,594 shares of MoPac Class A Stock in 1963 and presently own in excess of 11,000 shares of MoPac Class A Stock.

(c) At all times complained of herein, defendants Craft, Davis and Milbank have been and presently are directors

of MoPac.

(d) Defendants Craft and Davis are members of the Executive Committee of the MoPac Board of Directors.

(e) Defendant Craft is Chairman of the Finance Committee of the MoPac Board of Directors.

(f) Defendants Craft and Milbank are directors of defendant Mississippi.

(g) Defendant Craft is Chairman of the Board of Directors of defendant Mississippi.

8. At all times complained of herein and presently:

(a) The members of the MoPac Board of Directors, including defendants Craft, Davis and Milbank, have had and now have a duty to act in the interests of all shareholders of MoPac.

(b) Defendant Mississippi has had and now has a duty not to utilize its voting control over the composition of MoPac's Board of Directors in a manner which would cause MoPac's directors not to act in the interest of all MoPac stockholders.

9. At the time of MoPac's reorganization, Alleghany was the owner of 48% of the outstanding common stock of MoPac, for which it received Class B Stock pursuant to the plan of reorganization.

10. (a) Since MoPac's reorganization in 1955-1956, the net equity allocable to the 39,731 shares of Class B Stock has increased so substantially that it now greatly exceeds the fixed amount to which the preferred Class A Stock is entitled in the event of liquidation.

(b) In 1956, MoPac (which then published only unconsolidated financial statements), had a net equity of \$224,544,774, of which \$187,195,700, or 83.4%, was allocable to

the then outstanding 1,871,957 shares of Class A Stock, and \$37,349,074, or 16.6%, was allocable to the 40,648 outstanding shares of Class B Stock.

(c) During the period from 1962, when MoPac first published consolidated financial statements, through 1971, the amount of MoPac's net worth, as reported by it to its stockholders, allocable to the liquidation rights of the Class A Stock has remained constant (except for minor variations due to fluctuations in the number of Class A shares outstanding), while the net worth allocable to the Class B Stock has steadily grown as follows:

	<u>Total Net Worth</u>	<u>Net Worth Allocable to Class A</u>	<u>Net Worth Allocable to Class B</u>
1962 -	\$380,178,000	\$184,332,600	\$195,845,400
1963 -	395,894,282	184,957,600	210,936,682
1964 -	414,200,607	185,620,100	228,580,507
1965 -	429,825,000	184,462,500	245,362,500
1966 -	448,766,000	185,297,700	263,468,300
1967 -	471,072,000	185,877,700	285,194,300
1968 -	485,659,000	186,157,700	299,501,300
1969 -	497,937,000	186,335,200	311,601,800
1970 -	510,010,000	186,355,200	323,654,800
1971 -	517,860,000	186,405,200	331,454,800

(d) At the end of 1962, 48% of MoPac's Net Worth was allocable to the Class A Stock and 52% to the Class B stock, but as a result of the growth in MoPac's net worth, by the end of 1971 only 36% of MoPac's net worth was allocable to the Class A Stock, while 64% was allocable to the Class B Stock.

11. (a) At the end of 1971 each share of Class B Stock represented beneficial ownership of over \$8,300 of MoPac's net worth, while each share of Class A Stock represented only \$100.

(b) On June 30, 1972, MoPac Class A Stock closed at \$70 per share on the New York Stock Exchange.

(c) On June 30, 1972, MoPac's Class B Stock was quoted over the counter at per share prices of \$1,100 bid, \$1,175 asked.

(d) Because of the matters complained of herein, the market price of MoPac Class B Stock does not fully reflect the true value thereof.

12. (a) Since MoPac's reorganization in 1955-1956, its retained income has increased substantially.

(b) In 1955, MoPac (which then published only unconsolidated financial reports) reported retained income of \$14,606,049.

(c) Since 1962, MoPac (which then published and now publishes consolidated financial statements) reported to its shareholders the following retained income at the end of each year:

1962	-	\$189,871,000
1963	-	205,308,000
1964	-	223,318,000
1965	-	240,136,000
1966	-	258,678,000
1967	-	280,677,000
1968	-	293,535,000
1969	-	306,081,000
1970	-	318,145,000
1971	-	325,965,000

(d) Since MoPac's retained income is in addition to assets sufficient to satisfy fully all liabilities of MoPac,

including the maximum permissible distribution on Class A Stock in the amount of \$1,000,000. \$965,000 of MoPac's retained income at the end of 1967 was allocable to the Class B Stock.

13. (a) The growth in the net worth of MoPac since its reorganization in 1955-1956 has been in addition to substantial annual expenses for maintenance of and additions to the railroad's line, structures and equipment.

(b) From 1955 through 1971, MoPac has reported to its stockholders that it has made gross capital expenditures of \$876,416,723, an average annual investment of over \$50 million.

(c) The present condition of MoPac's plant, equipment, lines and facilities is excellent and is superior to most other Class I railroads in the United States.

14. (a) MoPac's annual net income after taxes has grown substantially since its reorganization in 1955-1956.

(b) In 1955, MoPac (which then published only unconsolidated financial statements) reported to its stockholders net income after taxes of \$14,595,039.

(c) Since 1962, MoPac (which then published and now publishes consolidated financial statements) reported to its stockholders annual net income after taxes as follows:

<u>Year</u>	<u>Per Share</u>	<u>Total Dividends Paid to Class A as Reported to Stockholders</u>	<u>Percent of Net Income Paid to Class A</u>
1964	\$5.00	\$9,263,000	36%
1965	5.00	9,284,000	35%
1966	5.00	9,243,000	33%
1967	5.00	9,283,000	29%
1968	5.00	9,302,000	41%
1969	5.00	9,314,000	44%
1970	5.00	9,317,000	43%
1971	5.00	9,319,000	54%

Average percentage of Net Income annually paid in dividends to the Class A 39%

16. Commencing with 1964, the Board of Directors of MoPac has declared annual dividends of \$5 per share on the MoPac Class B Stock. The total amounts of these dividends, and their relation to MoPac's after tax net income, were as follows:

<u>Year</u>	<u>Per Share</u>	<u>Total Dividends Paid to Class A as Reported to Stockholders</u>	<u>Percent of Net Income Paid to Class A</u>
1964	\$5.00	\$199,000	0.7%
1965	5.00	199,000	0.8%
1966	5.00	199,000	0.7%
1967	5.00	199,000	0.6%
1968	5.00	199,000	0.9%
1969	5.00	199,000	0.9%
1970	5.00	199,000	0.9%
1971	5.00	199,000	1.1%

17. (a) During the period 1964 through 1971, the amount of MoPac's net worth allocable to the Class B Stock

consistently has exceeded the amount of net worth allocable to the Class A Stock.

(b) During the period 1964 through 1971, the amount of dividends declared by the Board of Directors of MoPac on the Class B Stock has totalled \$1,592,000 while the amount of dividends declared on the Class A Stock has totalled \$74,325,000.

(c) During the period 1964 through 1971, the average percentage of MoPac's net income after taxes declared on the Class B Stock has been 0.8% while the average percentage declared on the Class A Stock has been 39%.

(d) During the period 1964 through 1971, the MoPac Board of Directors has declared dividends on the Class A Stock which have been more than forty-eight times those declared on the Class B Stock, although during the same period the average interest of the Class A Stock in MoPac's net worth has been 41% and the interest of the Class B Stock more than 59%.

18. MoPac must compute "Available Net Income" (hereinafter "ANI") by offsetting certain fixed charges against income available for fixed charges, and must set aside certain portions of ANI for capital expenditures and for mortgage bond sinking funds and, if earned, interest on debt obligations as fully set forth in § 5.02 of Article V of MoPac's General (Income) Mortgage dated January 1, 1955. MoPac's annual net income is available for payment of dividends on its capital stock of both classes to the extent that it exceeds the amounts thus required to be set aside from ANI.

19. (a) During the year 1964 (when MoPac first began paying regular annual \$5 dividends on its stock) through 1971

1962	-	\$22,250,000	
1963	-	24,958,000	
1964	-	27,472,000	
1965	-	26,301,000	
1966	-	27,984,000	
1967	-	31,481,000	(including extraordinary net income item)
1968	-	22,359,000	(including extraordinary net income item)
1969	-	21,287,000	
1970	-	21,580,000	
1971	-	17,338,000	(including extraordinary net income item)

15. (a) In every year since 1956, MoPac's Board of Directors has declared dividends on the Class A Stock.

(b) During the years 1956 through 1963, the annual dividends declared on MoPac's Class A Stock were less than \$5 per share, and no dividends were paid on the Class B Stock.

(c) Commencing with 1964, annual dividends in the maximum permissible amount of \$5 per share have been declared on MoPac Class A Stock. The total amounts of these dividends, and their relation to MoPac's after tax net income, are as follows:

MoPac's net income available for dividends (ANI after the deductions referred to in paragraph 18) as reported to its stockholders was:

1964	-	\$14,554,489
1965	-	13,595,346
1966	-	15,291,799
1967	-	27,493,000
1968	-	13,606,000
1969	-	10,892,000
1970	-	13,403,000
1971	-	4,469,000

(b) During the period 1964-1971, MoPac had annual and accumulated ANI after the deductions referred to in paragraph 18 and after payment of maximum permissible dividends on the Class A Stock in the following amounts:

		<u>Annual</u>	<u>Accumulated</u>
1964	-	\$ 5,291,489	\$40,296,000
1965	-	4,312,346	44,409,000
1966	-	6,048,799	50,259,000
1967	-	18,210,000	68,271,000
1968	-	4,304,000	72,533,000
1969	-	1,578,000	73,111,000
1970	-	4,086,000	77,197,000
1971	-	- 0 -	72,531,000

(c) During the period 1964-1971, the annual \$199,000 in dividends declared by the Board of Directors of MoPac on the Class B Stock constituted the following percentages of MoPac's accumulated net income available for payment of dividends on the Class B Stock:

1964	-	0.5%
1965	-	0.4%
1966	-	0.4%
1967	-	0.3%
1968	-	0.3%
1969	-	0.3%
1970	-	0.3%
1971	-	0.3%
Average	-	0.35%

20. Since 1964, when the Board of Directors of MoPac began declaring dividends of \$5 on both the Class A and Class B Stocks in each year which totalled \$9,250,000 on the Class A and \$199,000 on the Class B, MoPac's total retained income on a consolidated basis as reported to the stockholders has risen from \$223 million in 1964 to over \$325 million in 1971, and MoPac's unappropriated retained income, on an unconsolidated basis, as reported to the Interstate Commerce Commission, rose from \$71 million in 1964 to \$108 million in 1971.

21. Since 1964 when the Board of Directors of MoPac began declaring \$5 in dividends in each year on both the Class A and Class B Stocks, and limiting the Class B to \$199,000 per year while paying approximately \$9,250,000 per year to the Class A MoPac has, at the end of each year, reported to its stockholders in excess of \$97,000,000 in cash, temporary cash investments, special deposits and accounts receivable, on a consolidated basis, as follows:

<u>Year</u>	<u>Cash</u>	<u>Temporary Cash Investments</u>	<u>Special Deposits</u>	<u>Accounts Receivable</u>	<u>Totals</u>
1964	\$17,937,000	\$53,049,000	\$12,109,000	\$29,637,000	\$112,732,000
1965	10,222,000	69,693,000	8,829,000	28,665,000	117,409,000
1966	19,194,000	40,074,000	11,744,000	29,275,000	100,287,000
1967	27,344,000	30,916,000	9,036,000	38,885,000	106,181,000
1968	25,112,000	14,749,000	8,824,000	48,383,000	97,068,000
1969	25,410,000	15,641,000	9,831,000	57,760,000	108,642,000
1970	19,849,000	32,925,000	9,063,000	51,959,000	113,796,000
1971	23,843,000	42,126,000	8,328,000	51,091,000	125,388,000

22. Since 1964, the Board of Directors of MoPac, including defendants Craft, Davis and Milbank, has failed and refused to declare dividends in excess of \$5 per share on the Class B Stock of Mopac and has arbitrarily limited dividends on the Class B stock to the maximum permissible per share dividend payable on the Class A Stock. Despite the aforesaid enormous differences in equity and value between the two classes.

23. There has been no business justification for the continued failure since 1964 by MoPac's Board of Directors to declare dividends on the Class B Stock beyond the nominal amount of \$199,000 per year.

24. The arbitrary failure since 1964 by the Board of Directors of MoPac to pay reasonable dividends to MoPac's Class B stockholders was part of an unlawful scheme by defendant Mississippi, which controls MoPac's Board of Directors, to benefit Mississippi and the other Class A stockholders, including directors of MoPac, at the expense of the Class B stockholders.

25. Defendant Mississippi and the Board of Directors of MoPac, including defendants Craft, Davis and Milbank, have breached

their fiduciary duties to MoPac and the Class B stockholders of MoPac.

26. The arbitrary failure since 1964 to pay reasonable dividends to MoPac's Class B stockholders will continue unless enjoined.

27. Intervening plaintiff has no adequate remedy at law.

Intervening Plaintiff's Second Claim

28. Intervening plaintiff repeats and realleges the allegations contained in paragraphs 1 through 27 (including subparagraphs) hereof.

29. Commencing in or about 1959, defendant Mississippi began to purchase Class A Stock of MoPac for the purpose of acquiring voting control of MoPac.

30. By the end of 1962, defendant Mississippi had acquired a majority of the outstanding shares of MoPac Class A Stock, and since that time it continuously has had and continues to have voting control of MoPac.

31. Defendant Mississippi has continued to acquire shares of MoPac Class A Stock and presently owns in excess of 60% of the outstanding Class A Stock of MoPac.

32. Defendant Mississippi owns no shares of Class B Stock of MoPac.

33. Prior to December 1963, defendant Mississippi and its then chief executive officer, William G. Marbury ("Marbury") entered into a conspiracy with the members of the Board of Directors of MoPac to cause the owners of MoPac Class B Stock to

surrender their shares for less than the true value thereof, and thereby benefit defendant Mississippi and other owners of MoPac Class A Stock.

34. (a) Pursuant to said conspiracy, in 1963 defendant Mississippi caused the Board of Directors of MoPac, including Defendants Craft, Davis and Milbank, to adopt a scheme which, if carried out, would appropriate for defendant Mississippi and the other Class A stockholders of MoPac, more than 95% of the equity owned by the Class B Stock of MoPac.

(b) The aforesaid scheme involved formation of a new corporation and the consolidation of MoPac with the Texas and Pacific Railway Company, which was then 83% owned by MoPac.

(c) The aforesaid scheme involved issuance of the same number of shares of stock in the new corporation for each outstanding share of MoPac Class A and Class B Stock, despite the fact that MoPac Class B Stock then had per share equity more than 52 times greater than Class A, and despite the fact that MoPac Class B Stock was then traded at a price per share many times greater than MoPac Class A Stock.

(d) The aforesaid scheme involved denial of the right to a class vote with respect to a merger or consolidation.

(e) The effect of the aforesaid scheme, if carried out, would have been to deprive the holders of MoPac Class B Stock of more than \$200 million of equity in MoPac, most of which would have gone to defendant Mississippi, the owner of a majority of the Class A Stock.

(f) The aforesaid scheme was not abandoned by defendant Mississippi and the Board of Directors of MoPac, including defendants, Craft, Davis and Milbank, until the United States Supreme Court unanimously held in 1967, 386 U.S. 162, that the

scheme illegally violated the rights of the holders of MoPac's Class B Stock.

(g) After remand by the United States Supreme Court, the District Court (E.D. Mo.; Meredith, J.) found on January 12, 1968 that the aforesaid scheme was inherently unfair to the Class B shareholders and "would have taken from the B stockholders an equity in excess of \$200,000,000 and given it to the A stockholders."

35. (a) Further pursuant to said conspiracy to benefit defendant Mississippi at the expense of the Class B stockholders by causing the owners of the Class B Stock to surrender their shares at less than fair value, the defendants, notwithstanding their fiduciary duties toward all the stockholders of MoPac, have attempted to depress the market value of the Class B Stock by publicly denigrating its value.

(b) In 1963, Mississippi's and MoPac's then chief executive officer, Marbury, stated for publication in "Forbes" magazine that the Class B Stock is a "second-class stock."

(c) On December 12, 1963, Marbury characterized the Class B Stock as "second best" and a second-class stock in a speech to a group of securities analysts in New York City.

(d) On other occasions, the circumstances of which are fully known to defendants and not to intervening plaintiff, Marbury made similar derogatory statements to the financial press and others (e.g., anyone is "crazy" to pay the market price for Class B Stock), as has Downing B. Jenks, Chief Executive Officer of MoPac and President of Mississippi (e.g., MoPac Class B Stock "isn't worth" the market price at which it sells).

paragraphs) hereof, and further alleges that:

41. In furtherance of the conspiracy to cause the owners of MoPac Class B Stock to surrender their shares for less than the true value thereof, the defendants, together with Marbury and the Boards of Directors of MoPac and Mississippi, by means of interstate commerce, the mails and the facilities of national securities exchanges, have engaged in a continuous course of manipulative and deceptive conduct. This conduct includes, inter alia, the making of untrue statements of material fact, and omissions to state material facts necessary in order to render statements made by them not misleading. This course of conduct has operated as a fraud and deceit both upon the plaintiffs and the Class B stockholders represented by them, and upon those members of the investing public at large who bought and sold shares of MoPac A and B Stock during that period. This conduct commenced prior to 1963 and continues to the present.

42. As part of said course of manipulative and deceptive conduct the defendants and their aforescribed co-conspirators performed each of the acts described in paragraphs 34 through 36 (including subparagraphs) above.

In addition:

43. The defendants and their aforesaid co-conspirators have caused to be distributed to the stockholders of MoPac, through the mails and in interstate commerce, annual reports, and various other writings and communications containing false and misleading statements of material facts, and omissions of material facts, including the following:

(a) a statement that MoPac's plan for consolidation with the T & P would produce economies of operation when defendants knew that no substantial economies of operation could be realized from the plan;

(b) failure to disclose that the true motive of defendants and of all the directors of MoPac, in proposing said plan, was to appropriate almost 98% of the equity of the Class B Stockholders to the Class A Stock;

(c) Statements showing annual per-share earnings for the Class A Stock as \$6.72 in 1961, \$12.07 in 1962, \$13.34 in 1963, \$13.66 in 1964, \$14.26 in 1965 and \$14.43 in 1966, whereas in fact, as found by the United States Supreme Court and as specified in MoPac's charter and as defendants well knew, the Class A Stock is limited to a maximum dividend right of \$5 per year as and if declared, and has no equity rights whatsoever beyond the stated value of \$100 per share, amounting in total to approximately \$185,000,000 for all Class A shares, which amount was more than covered by the surplus account of the corporation during the aforesaid years;

(d) failure, during the same years aforesaid in subparagraph (c) above, to state any earnings per share whatsoever for the Class B Stock, which is the sole stock entitled to share in the residual equity of the corporation, clearly including all annual earnings over and above \$5 per share of Class A Stock.

(e) failure, for the years 1967 to the present, to report any per share earnings whatsoever for any of MoPac's stocks, despite the opinion of the Accounting Principles Board that such information is highly significant to investors and should be prominently reported in financial statements.

(f) failure to report to MoPac's stockholders and the investing public that the reason for MoPac's discontinuance of its past practice of reporting earnings per share of Class A Stock by attributing all earnings to the Class A and none to the Class B was that the Securities and Exchange Commission had informed MoPac that such reporting was incorrect and improper.

44. Had the earnings figures referred to in subparagraphs (c) and (d) been correctly and honestly stated, they would have shown the following earnings per share of Class B Stock for each of the years 1961 through 1966: \$80.50 in 1961, \$326 in 1962, \$333 in 1963, \$405 in 1964, \$428 in 1965 and \$441 in 1966.

45. The foregoing conduct was part of a plan and conspiracy conceived and carried out by defendants and their co-conspirators, to create an impression in the minds of the Class B shareholders and the investing public at large, by means of misreporting earnings and withholding dividends and otherwise, that the Class B Stock was far less valuable than was the fact, in order thereby to drive down the market price of the Class B and enable defendants to force its surrender, purchase it and destroy its equity in MoPac.

46. During the period of said conspiracy, defendants Mississippi and T. C. Davis bought and sold shares of MoPac's Class B Stock.

47. During the period of said conspiracy, plaintiff Alleghany made purchases of MoPac Class B Stock.

48. The aforesaid conduct of defendants and their co-conspirators was and is in violation of state and federal statutes (including section 10(b) of the Securities Exchange Act of 1934)

and their common law fiduciary duty.

WHEREFORE, plaintiffs pray for judgment:

(1) Directing that MoPac, through its Board of Directors, declare and pay fair and reasonable dividends on the Class B Stock for the year 1964 and for each of the years thereafter through 1971 with interest thereon from the time when such dividends should have been paid; or, in the alternative, awarding plaintiffs and all members of the class represented by them, damages against each of the defendants in the amount of the injury suffered by them during the years 1964 through 1971 as measured by the amount of reasonable dividends withheld by defendants pursuant to the fraudulent scheme complained of herein, with interest thereon from the time when such dividends should have been paid;

(2) Enjoining the defendants, temporarily and permanently, from inequitably refusing to declare and pay fair and reasonable dividends on the Class B Stock in the future, and directing defendants to cause fair and reasonable dividends to be paid on the Class B Stock in the future;

(3) Awarding plaintiff-intervenor its cost and expenses of this action, including reasonable attorneys' fees;

(4) Retaining jurisdiction of this action for such period as may be necessary in order to assure compliance with the Court's order;

(5) Granting plaintiff-intervenor such other and further relief as may be just and equitable.

July 14, 1972

DONOVAN LEISURE NEWTON & IRVINE

By 

A Member of the Firm

Two Wall Street
New York, New York 10005
(212) 732-4100

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
BETTY LEVIN, on behalf of herself and all
other holders of the Class B Common Stock
of Missouri Pacific Railroad Company, and
on behalf of said corporation,

Plaintiff,

67 Civ. 5095 (E.W.)

-against-

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT, T. C. DAVIS and
THOMAS F. MILBANK,

AMENDED
COMPLAINT

(Class Action)

Defendants.

-----x

Plaintiff alleges upon information and belief (except
that paragraphs 2(a) through (d), 2(g), 3(h), 14(d) through (f), and
14(h) and (i) are alleged upon knowledge):

FIRST COUNT

1. (a) Defendant MISSISSIPPI RIVER CORPORATION
(formerly known as Mississippi River Fuel Corporation, and herein-
after called Mississippi) is a corporation organized under the
laws of Delaware.

(b) Defendant MISSOURI PACIFIC RAILROAD COMPANY
("MoPac") is a corporation organized under the laws of Missouri.

(c) MoPac is a common carrier by railroad, and
operates lines of railroad in interstate commerce.

(d) MoPac is controlled by Mississippi.

(e) Mississippi and MoPac jointly maintain offices
in the City, County, and State of New York, occupying the entire
forty-third floor of the building at 20 Exchange Place, New York,
New York. MoPac also maintains offices at 225 Broadway, New York,
New York.

(f) Defendant ROBERT H. CRAFT is Chairman of the Board of Directors, member of the Finance and Executive Committees, and former Financial Vice President of Mississippi, and a director (since 1956), Chairman of the Finance Committee, and a member of the Executive Committee of MoPac.

(g) Defendant ROBERT H. CRAFT is a citizen of New York, and maintains his office with Mississippi and MoPac at 20 Exchange Place, New York, New York.

(h) Defendant THOMAS F. MILBANK was (from 1961 to 1970) a director and member of the Executive Committee of Mississippi, and was (from 1962 to 1970) and is now a director of MoPac.

(i) Defendant THOMAS F. MILBANK is a citizen of New York, and maintains an office at 41 East 42nd Street, New York, New York.

(j) Defendant T.C. DAVIS is a director (since 1941), member of the Executive Committee, and former Chairman of the Board of MoPac.

(k) Defendant T.C. DAVIS is a citizen of New York, and maintains an office at 230 Park Avenue, New York, New York.

2. (a) Plaintiff is, and was at the times of the matters complained of in paragraph 11 hereof, the owner and holder of 320 shares of Class B Common Stock of MoPac, and, at the times of all other matters complained of herein, was the owner and holder of not less than 85 shares of said stock.

(b) The amount in controversy, exclusive of interest and costs, exceeds the sum of \$10,000 with respect to the named plaintiff.

(c) Plaintiff is a citizen of the Commonwealth of Massachusetts.

(d) Plaintiff brings this action on behalf of herself, representatively on behalf of all other holders of Class B Common Stock of MoPac, and derivatively on behalf of MoPac.

(e) There are about 1,200 holders of Class B Common Stock of MoPac. About 52% of the MoPac Class B stock is owned by Alleghany Corporation, a Maryland corporation whose principal place of business is in New York City.

(f) The MoPac Class B stockholders are so numerous as to make it impracticable to join them all and bring them all before the Court; there are questions of law and fact common to the class; the claims of plaintiff are typical of the claims of the class; the defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole; and plaintiff will fairly insure the adequate representation of all members and will fairly and adequately protect the interests of the class.

(g) This action is not brought collusively to confer upon this Court jurisdiction that it would not otherwise have.

3. (a) MoPac's outstanding capital stock consists of about 1,860,000 shares of Class A stock and 39,731 shares of Class B stock; as of December 31, 1971, there were outstanding 1,864,052 shares of MoPac Class A stock and 39,731 shares of MoPac Class B stock.

(b) MoPac's capital stock was issued pursuant to a plan of reorganization confirmed and consummated in proceedings under Section 77 of the Bankruptcy Act, from which proceedings MoPac emerged as of January 1, 1955.

(c) MoPac's Class A stock replaced its former (pre-

reorganization) preferred stock, and its Class B stock replaced its former common stock. Immediately prior to the reorganization, MoPac's outstanding capital stock consisted of 701,901 shares of 5% cumulative preferred and 813,143 shares of common stock. Under the plan of reorganization, each share of old preferred (with its claim to accrued dividends) was exchanged for 2.645 shares of new Class A stock, and each 20 shares of old common was exchanged for one share of new Class B stock.

(d) MoPac's Class A stock is preferentially entitled to non-cumulative dividends, when and as declared by the Board of Directors, not to exceed \$5 per share in any calendar year, and in the event of any liquidation or dissolution or winding up of MoPac, to assets not to exceed \$100 per share together with any dividends declared but not paid on the Class A stock.

(e) MoPac's Class B stockholders are "entitled . . . to all residual earnings after payment of dividends on the new class A stock", as the Interstate Commerce Commission ("ICC") stated in approving the plan of reorganization (290 ICC 477, 600).

(f) MoPac's Class B stock is entitled to all the earnings and the equity in excess of the Class A preferences.

(g) In the election of directors of MoPac, each Class A share and each Class B share has one vote, and the stockholders have cumulative voting rights. By reason of the larger number of outstanding shares of Class A than of Class B stock, the Class A stock has about 98 per cent and the Class B stock has about 2 per cent of the voting power for the election of directors. The Class B stockholders thus do not have sufficient votes to elect any director.

(h) The respective rights and privileges of the Class A and Class B stocks are set forth in Article VII D of MoPac's Articles of Association, a true copy of which Article is attached hereto as Exhibit A.

(i) The MoPac Class A stock is listed and traded on the New York Stock Exchange; the MoPac Class B stock is traded in the over-the-counter market, principally in New York City.

4. (a) Mississippi now owns about 1,157,000 shares of the MoPac Class A stock, constituting about 62 per cent of the Class A stock and 61 per cent of the total number of outstanding shares entitled to vote for directors of MoPac.

(b) Mississippi owned no MoPac stock or securities at the time of the MoPac reorganization, nor for several years thereafter.

(c) In 1950, William G. Marbury, then and until his death in 1971 Chairman of the Board and Chief Executive Officer of Mississippi, became a director of MoPac, and the annual dividend on the MoPac Class A stock was reduced to \$2.40 per share (60 cents per quarter), down from \$4.10 for the previous year.

(d) Mississippi then began its acquisitions of MoPac Class A stock, and the dividend thereon was kept at 60 cents per share per quarter until Mississippi had acquired more than one million shares thereof: 247,200 by the end of 1959 (13% of the total number of voting shares of MoPac, and the largest number held by a single stockholder); 474,400 (25% of said total) by the end of 1960; 605,700 (32% of said total) by the end of 1961; 980,000 (52% of said total) by the end of 1962; and 1,071,895 (57% of said total) by the end of 1963.

(e) In December 1963, a special dividend was declared on the MoPac Class A stock, raising the total dividends for that year to \$4.00 per share of Class A stock.

(f) From 1964 through 1971, the maximum dividend of \$5.00 per share per year has been paid on the Class A stock.

(g) Mississippi controls and dominates the affairs of MoPac, and has done so throughout the period when the matters complained of by plaintiff occurred.

(h) Mississippi nominated and caused the election of each of the MoPac directors, including the individual defendants.

(i) None of the MoPac directors has been elected by the Class B stockholders, who are excluded from representation on the board of directors.

(j) There is interlocking of the directors and officers of Mississippi and MoPac. Five individuals serve as directors of both Mississippi and MoPac, and also serve as officers or members of the Executive or Finance Committees of one or both corporations.

(k) Neither Mississippi nor any director of MoPac owns any MoPac Class B stock.

5. At the ends of the years of 1964 through 1971, the MoPac consolidated shareholders' equity was as follows:

Year (at Dec. 31)	Capital Stock		Capital Surplus	Retained Income	Total Shareholders' Equity
	Class A	Class B			
1964	\$185,620,100	\$3,973,100	\$1,289,832	\$223,317,575	\$414,200,607
1965	184,462,500	3,973,100	1,253,533	240,136,157	429,825,290
1966	185,297,700	3,973,100	817,321	258,677,477	448,765,598
1967	185,877,700	3,973,100	544,000	280,677,000	471,071,800
1968	186,157,700	3,973,100	1,993,000	293,535,000	485,658,800
1969	186,335,200	3,973,100	1,548,000	306,081,000	497,937,300
1970	186,355,200	3,973,100	1,537,000	318,145,000	510,010,300
1971	186,405,200	3,973,100	1,517,000	325,965,000	517,860,300

Copies of MoPac's consolidated balance sheets covering said dates are attached hereto as Exhibit B.

6. As of December 31, 1971, the equity of each share of the MoPac Class A stock was \$100 (the maximum to which it is permanently limited), and the equity of each share of the MoPac Class B stock was \$8,342.

7. During each of the eight years 1964 through 1971, the consolidated net income of MoPac has averaged at least \$24.3 million. Copies of MoPac's statements of consolidated income covering said years are attached hereto as Exhibit C.

8. During the eight years 1964 through 1971, the residual consolidated net income on the MoPac Class B stock (i.e., after payment of maximum dividends of \$5 per share on the Class A stock) was not less than as follows:

Year	Consolidated Net Income	Dividends on Class A Stock	Residual Earnings on Class B Stock	Earnings Per Share on Class B Stock (39,731 shares)
1964	\$27,472,000	\$9,263,000	\$18,209,000	\$458
1965	26,301,000	9,284,000	17,017,000	428
1966	27,984,000	9,243,000	18,741,000	474
1967	30,378,000*	9,283,000	21,095,000	556
[This action commenced December 29, 1967]				
1968	22,128,000*	9,302,000	12,826,000	323
1969	22,287,000	9,314,000	11,973,000	301
1970	21,580,000	9,317,000	12,263,000	302
1971	17,338,000*	9,319,000	8,019,000	204

*Including extraordinary items.

9. (a) MoPac's financial condition is sound. As set forth on page 2 of the MoPac Annual Report for 1966 and pages 2 and 3 of the MoPac Annual Report for 1971, copies of which pages are attached hereto as Exhibit D:

- (i) The MoPac system in 1971 achieved new peaks in gross revenues and freight ton-miles, and continued to prosper and grow.
- (ii) MoPac has carried out a continuous program of modernization of its system. During the past decade, MoPac invested more than \$650,000,000 in system improvements and additions; and the railroad is in excellent condition.

(b) MoPac continued its improvement program in 1971, and has projected further substantial investments in new equipment in 1972.

(c) MoPac ended each of the eight years 1964 through 1971 with surplus, current and total assets, and cash and temporary cash investments in very substantial amounts, as set forth in Exhibit B hereto.

(d) In each of the eight years 1964 through 1971, MoPac was in sound financial condition as measured by MoPac's operating ratio, rate of return on net worth, and rate of return on net investment in transportation property.

(e) MoPac's long-term outlook continues to be bright.

10. In breach of its fiduciary obligations to MoPac and to MoPac's Class B Stockholders, Mississippi, acting in concert with the individual defendants and the other directors of Mississippi and MoPac, has entered upon, and is in the process of carrying out, an unlawful scheme to enrich itself by depriving MoPac's Class B stockholders of their rightful share of MoPac's earnings, and by destroying the Class B stockholders' valuable residual equity in MoPac, as hereinafter alleged.

11. (a) In each of the years 1964 through 71, full dividends of about \$9.3 million were paid on the MoPac Class A stock (at the maximum rate of \$5 per share).

(b) In each of the years 1964 through 1971, dividends of \$198,655 were paid on the Class B stock (at the rate of \$5 per share), a distribution amounting to approximately one percent of the residual earnings for such stock.

(c) Since MoPac emerged from reorganization, (i) dividends on the Class A stock have aggregated about \$114 million, (ii) residual earnings (after dividends on the Class A stock) have aggregated about \$245 million, (iii) retained income has aggregated more than \$500 million, and (iv) no dividends have been paid on the Class B stock other than those referred to in the immediately preceding subparagraph hereof.

(d) Said dividends on the Class B stock are grossly inadequate in the circumstances of MoPac's financial and physical condition, earnings, business conditions and prospects, and ability to pay dividends, as set forth in paragraphs 5 through 9 hereinabove.

(e) Said dividends are grossly inadequate when measured by the prevailing dividend policies and practices of comparable railroads.

(f) MoPac has accumulated and is accumulating surplus over and above what is requisite for the payment of current expenses of the business and for discharging obligations to creditors, and over and above what reasonable prudence would require to be kept in the treasury to meet the accidents, risks, and contingencies incident to the business of operating the railroad system.

(g) The inadequacy of the dividends declared on the Class B stock was protested at the time of the first declaration, in December 1964, and payment of adequate dividends on the

Class B stock was then demanded of the MoPac board of directors. The individual defendants were then, as now, members of said board. Further demand upon the board of directors of MoPac is unnecessary and would be futile, because the directors who engaged in the transactions and conduct complained of herein comprise the entire board of directors of MoPac, most of them were members of said board when said demand was made in 1964, and all of them were elected and are dominated by the defendant Mississippi.

12. Prior to Mississippi's acquisition of control of MoPac:

(a) When defendant T. C. DAVIS was Chairman of the Board of MoPac, he wrote to the MoPac stockholders as follows:

"There is no reason why full dividends should not be paid on the preferred [Class A] stock and large dividends paid on the common [Class B] stock."

(b) A former Chief Executive Officer of MoPac, the late P. J. Neff, testified that prudent management ought to cause a good, well-operated railroad, specifically including MoPac, to pay out sixty percent of its earnings as dividends, and that that would constitute a fair and reasonable distribution.

13. In pursuance of said unlawful scheme and in order to enrich Mississippi at the expense of MoPac and the Class B stockholders of MoPac and for the purpose of diverting to Mississippi as a Class A stockholder the funds which belong to the Class B stockholders and which have not been paid to them as a result of the policies set forth in paragraphs 10 and 11 hereof, Mississippi and said directors embarked upon a plan described by a Justice of the United States Supreme Court as "one of the most notorious pieces of predatory finance I have seen - and I have seen quite a few."

14. (a) In December 1963, the directors of MoPac, all elected by Mississippi, unanimously approved a so-called Plan of Consolidation (the "Plan") that would have stripped the Class B stockholders of more than \$200 million of their then equity and practically all of their future earnings, reducing their 100% residual interest to 2%. Under the Plan, most of these tremendous values and rights belonging to the Class B stockholders would have been taken over by Mississippi, and the limitations and restrictions on the Class A's right to participate in earnings and equity would have been eliminated.

(b) The Plan provided that MoPac and one of its present subsidiaries would be consolidated with a new subsidiary created to be the surviving corporate entity. Notwithstanding the vast differences in the rights and values of MoPac's two classes of stock, the Plan would have treated identically all the shares of both classes. The Plan required that each MoPac share of each class, A and B without distinction, be surrendered for four shares of the new subsidiary's single class of common stock. All the present MoPac stock would be cancelled, and MoPac would cease to exist as a corporate entity. Since the MoPac Class A shares outnumber the MoPac Class B shares by 98 to 2, the proposed exchange would have shifted almost all of the Class B's 100% residual equity and earnings to the Class A stockholders, principally Mississippi.

(c) Defendants announced publicly, and represented to the ICC, that the Plan required approval by a collective vote, not a class vote, of the MoPac stockholders, and that such collective vote would be held at the annual MoPac stockholders' meeting in 1964 or at an earlier special meeting.

(d) Several Class B stockholders sued to enjoin the Plan as a fraud on the Class B stockholders in violation of

the fiduciary obligations of defendants Mississippi and the directors of MoPac, and the proposed collective vote as a violation of the Class B stockholders' separate class voting rights.

(e) The separate class voting rights of the Class B stockholders were upheld by the district court. Slayton, et al. v. Missouri Pacific Railroad Company, et al., 233 F.Supp. 747 (E.D. Mo. 1964).

(f) The Court of Appeals for the Eighth Circuit unanimously reversed, ruling in favor of Mississippi, et al. 359 F.2d 106 (8th Cir. 1966).

(g) The Supreme Court of the United States granted certiorari. 385 U.S. 814 (1966). At the oral argument, one Justice said that the Plan "is one of the most notorious pieces of predatory finance I have seen -- and I have seen quite a few." Another Justice said of the Plan: "As I understand its operation, it could be no more unfair unless you just say they could take it all away from you."

(h) The Supreme Court unanimously reversed the judgment of the Court of Appeals for the Eighth Circuit. Levin v. Mississippi River Fuel Corporation, et al., 386 U.S. 162 (1967). The Supreme Court said that, with the equity of each Class A share limited to \$100 and the equity of each Class B share then about \$6,500, the Plan's proposed exchange of four new shares for each Class B share "is like exchanging four rabbits for one horse." 386 U.S. at 169.

(i) The Supreme Court did not remand to the Court of Appeals for the Eighth Circuit, but rather, after citing the requirements of "[e]ffective judicial administration", remanded to the district court. 386 U.S. at 170.

15. As a further part of said unlawful scheme, Mississippi and said directors have used their control and

domination of the affairs of MoPac to benefit Mississippi at the expense of MoPac and its Class B stockholders, and have repeatedly acted contrary to, and failed and refused to act in, the best interests of MoPac and all its stockholders, as hereinafter alleged.

16. (a) As part of said scheme, Mississippi and said directors have publicly denigrated the MoPac Class B stock.

(b) In 1961, William G. Marbury, then and until his death in 1971 Chairman of the Board and Chief Executive Officer of Mississippi and a director and Chairman of the Executive Committee of MoPac, told the MoPac stockholders at their annual meeting:

"[The Class B stock is] a class of stock that should never have been issued, in my opinion . . . It's like a bad eye or a deaf ear . . . I wish it weren't there."

(c) In 1961, when the MoPac Class B stock was selling over-the-counter for about \$400 a share, William G. Marbury stated for publication in The New York Times (October 29, 1961, p. F3):

"Anybody's crazy to pay it!"

and D. B. Jenks, then a director of Mississippi and President of MoPac, and now a director, President and Chief Executive Officer of Mississippi, and Chairman of the Board and Chief Executive Officer of MoPac, stated (id.):

"It isn't worth it!"

(d) In 1963, William G. Marbury stated for publication in a magazine with national circulation (Forbes, June 15, 1963, p. 25):

"[T]here are second-class stocks, and that's what the [MoPac Class B] is. That's why they call it the B. When we pay \$5 on the A, we'll also pay \$5 on the B. That's fair enough."

17. (a) In 1965, when Mississippi's outstanding stock consisted of about four million shares of common stock selling on the New York Stock Exchange at about \$40 per share, Mississippi doubled the number to eight million by a two-for-one stock split. William G. Marbury stated the following reasons for the stock split in a letter to the stockholders of Mississippi dated March 4, 1965:

"The Directors believe the change [split] will result in a broadening of public interest in the stock, an increase in the number of stockholders, and a greater availability of shares for purchase and sale; and that this will be in the best interests of the stockholders."

(b) Although there are only 39,731 outstanding shares of MoPac Class B stock, selling currently at about \$1,000 per share, the defendants have failed and refused to split the Class B stock or to take any other step that will result in a broadening of public interest in the stock, an increase in the number of stockholders, and a greater availability of shares for purchase and sale.

18. (a) MoPac's federal income taxes in the eight years 1964 through 1971 have averaged about \$3 million a year.

(b) MoPac's past, present, and future federal income taxes could have been, and could be, materially reduced by replacing MoPac Class A stock with debentures or other interest-bearing securities, since interest payments (unlike dividends) are deductible in computing the payor's federal taxable income.

(c) Mississippi, in computing its own federal taxable income, is allowed to deduct an amount equal to at least 85% of the amount of dividends it receives from MoPac on the MoPac Class A stock. Mississippi would not be allowed any similar or corresponding deduction with respect to interest payments it might receive from MoPac.

(d) Mississippi has wrongfully, and because of its conflicting self-interest, failed and refused to take, and to cause or permit MoPac to take, any step to reduce MoPac's federal income taxes by replacing MoPac Class A stock with interest-bearing securities. Such failure and refusal have caused and continue to cause a waste of MoPac's assets.

19. As a result of the foregoing and other wrongful acts and omissions by the defendants and said directors, the Class B stockholders have been severely damaged.

20. Plaintiff has no adequate remedy at law.

SECOND COUNT

21. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 19 (including subparagraphs) hereof, and further alleges that:

22. (a) In furtherance of the scheme to enrich Mississippi by depriving MoPac's Class B stockholders of their rightful share of MoPac's earnings and by destroying the Class B stockholders' valuable residual equity in MoPac,

(i) defendant Mississippi and its then chief executive officer, William C. Marbury ("Marbury"), entered into a conspiracy with the members of the Board of Directors of MoPac to cause the owners of MoPac Class B stock to surrender their shares for less than the true value thereof (as alleged, inter alia, in paragraph 14 hereof), and

(ii) the defendants, pursuant to said conspiracy, attempted to depress the market value of the MoPac Class B stock by, inter alia, limiting the level of dividends on the Class B stock to \$5 per share per year, publicly denigrating the value of the Class B stock, failing to split the Class B stock, and failing to reduce MoPac's federal income taxes, all as hereinabove alleged.

(b) In furtherance of the conspiracy to cause the owners of MoPac Class B stock to surrender their shares for less than the true value thereof, the defendants, together with Harbury and the Boards of Directors of MoPac and Mississippi, by means of interstate commerce, the mails, and the facilities of national securities exchanges, have engaged in a continuous course of manipulative and deceptive conduct. This conduct includes, inter alia, the making of untrue statements of material fact, and omissions to state material facts necessary in order to render statements made by them not misleading. This course of conduct has operated as a fraud and deceit upon the plaintiff and the Class B stockholders represented by her, and upon those members of the investing public at large who bought and sold shares of MoPac Classes A and B stock during that period. This conduct commenced prior to 1963 and continues to the present.

23. As part of said course of manipulative and deceptive conduct, the defendants and their aforescribed co-conspirators performed each of the acts described in paragraphs 11, 14, and 16 through 18 hereof. In addition:

24. The defendants and their aforesaid co-conspirators have caused to be distributed to the stockholders of MoPac, through the mails and in interstate commerce, annual reports and various other writings and communications, containing false and misleading statements of material facts, and omissions of material facts, including the following:

(a) a statement that MoPac's plan of consolidation referred to in paragraph 14 hereof would produce economies of operation, when defendants knew full well that no substantial economies of operation could be realized from the plan;

V (b) failure to disclose that the true motive of defendants and of all the directors of MoPac, in proposing said plan, was to appropriate almost 98% of the equity of the Class B stockholders to the Class A stock;

(c) statements showing annual per-share earnings for the Class A stock as \$6.72 in 1961, \$12.07 in 1962, \$13.34 in 1963, \$13.66 in 1964, \$14.26 in 1965 and \$14.43 in 1966 (as shown in Exhibit D hereto), whereas in fact, as found by the United States Supreme Court and as specified in MoPac's charter and as defendants and their aforesaid co-conspirators well knew, the Class A stock was and is limited to a maximum dividend right of \$5 per year as and if declared, and has no equity rights whatsoever beyond the stated value of \$100 per share, amounting in total to approximately \$185,000,000 for all Class A shares, which amount was more than covered by the surplus account of MoPac during the aforesaid years;

✓ (d) failure, during the same years aforesaid in subparagraph (c) above, to state any earnings per share whatsoever for the Class B stock, which is the sole stock entitled to share in the residual equity of MoPac, clearly including all annual earnings over and above \$5 per share of Class A stock;

✓ (e) failure, for the years 1967 to the present, to report any per-share earnings whatsoever for any of MoPac's stocks, despite the opinion of the Accounting Principles Board that such information is highly significant to investors and should be prominently reported in financial statements;

✓ (f) failure to report to MoPac's stockholders and the investing public that the reason for MoPac's discontinuance of its past practice of reporting earnings per share of Class A stock by attributing all earnings to the Class A and none to the Class B was that the Securities and Exchange Commission had informed MoPac that such reporting was incorrect and improper.

25. Had the earnings figures referred to in subparagraphs (c) and (d) of paragraph 24 above been correctly and honestly stated, they would have shown the following earnings per share of Class B stock for each of the years 1961 through 1966: \$80.50 in 1961, \$328 in 1962, \$395 in 1963, \$458 in 1964, \$428 in 1965, and \$474 in 1966.

26. The foregoing conduct was part of a plan and conspiracy conceived and carried out by defendants and their co-conspirators to create an impression in the minds of the MoPac Class B shareholders and the investing public at large, by means of misreporting earnings and withholding dividends and otherwise, that the Class B stock was far less valuable than was the fact, in order thereby to drive down the market price of the Class B and enable defendants to force its surrender, purchase it, and destroy the Class B shareholders' equity in MoPac and acquire the value of said equity for Mississippi and the other Class A shareholders of MoPac.

27. During the period of said conspiracy, defendants Mississippi and T. C. Davis bought and sold shares of MoPac Class B stock.

28. During the period of said conspiracy, Alleghany and others made purchases of MoPac Class B stock.

29. The aforesaid conduct of defendants and their co-conspirators was and is in violation of state and federal statutes (including Section 10(b) of the Securities Exchange Act of 1934) and their common-law fiduciary duty.

WHEREFORE, plaintiff demands judgment that:

(1) The Board of Directors of MoPac be ordered to declare, and MoPac be ordered to pay, dividends on the MoPac Class B stock, in such amounts as the Court shall determine to be just and reasonable, for the year 1964 (including for such dividends from retained income accumulated by MoPac in the

1971, with interest thereon from the time when such dividends should have been paid; or, in the alternative, awarding plaintiff and all members of the class represented by her damages against each of the defendants in the amount of the injury suffered by them during the years 1964 through 1971 as measured by the amount of reasonable dividends withheld by defendants pursuant to the fraudulent scheme complained of herein, with interest thereon from the time when such dividends should have been paid;

(2) Mississippi and the Board of Directors of MoPac be enjoined from the illegal, oppressive, and arbitrary use of their power to withhold dividends on the MoPac Class B stock, and be required to cause to be declared and paid adequate dividends on said stock in the future;

(3) Plaintiff be awarded the costs, expenses, and reasonable counsel fees of this action, and defendant MoPac be reimbursed by Mississippi and the individual defendants for all such amounts paid by MoPac;

(4) This Court retain jurisdiction of this matter for such period of time as the Court may deem reasonable to obtain compliance with its judgment; and

(5) Plaintiff be granted such other and further relief as may be just.

ORAMS, ELSÉN & POLSTEIN

By: *[Signature]*

A Member of the Firm
One Rockefeller Plaza
New York, New York 10020
JU 6-2211

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF MIDDLESEX, ss

Betty Levin, being duly sworn, deposes and says that she is the Plaintiff in the within action; that she has read the foregoing amended complaint and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Betty Levin
Betty Levin

Subscribed and sworn to before me July 24, 1972.

Alvin Levin

Alvin Levin, Notary Public
My Commission Expires
October 18, 1974

United States District Court
SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, ALLEGHANY CORPORATION and
 ROBERT LEVASSEUR,
Plaintiffs,

against

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC
 RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS
 and THOMAS F. MILBANK,
Defendants.

67 Civil. 5095

OPINION

EDWARD WEINFELD, D. J.

This is a motion pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure for approval of a settlement agreement of a class action brought on behalf of Class B stockholders of the Missouri Pacific Railroad Company (MoPac), an interstate railroad. The plaintiffs in the class action are Alleghany Corporation (Alleghany), the owner of a majority of the outstanding shares of Class B stock, and two individual owners of such stock, Betty Levin (Levin) and Robert LeVasseur (LeVasseur), who also assert derivative claims on behalf of and in the right of MoPac. The defendants include Mississippi River Corporation (Mississippi), the owner of a majority of the outstanding Class A stock of MoPac, and three individual defendants, directors of MoPac, two of whom are also directors of Mississippi. In the event the proposed settlement is approved, applications for allowance of attorneys' fees and expenses are to be considered following entry of final judgment.

HISTORICAL BACKGROUND OF THE CLASS A AND CLASS B STOCK

The capitalization of MoPac has been the subject of controversy and litigation for almost forty years. The Class A and Class B stockholders have been at odds over their respective rights and interests over a substantial period. Their differences were accentuated by MoPac's restructured capitalization when in 1956 it emerged from reorganization proceedings filed in 1933. During those twenty-three years various proposed plans of reorganization failed to gain acceptance. Alleghany Corporation, the owner of about half of MoPac's then outstanding common stock, had opposed reorganization plans proposed in 1940, 1944 and 1949 because none provided for the old common stockholders. Finally, a fourth plan, referred to as an "Agreed System Plan," was proposed by the reorganization Trustee, approved by the Interstate Commerce Commission in 1954, accepted by Alleghany and other interests, and became effective March 1, 1956.⁽¹⁾ The plan, which then seemed to be an ingenious way to compose differences among various security and equity interests, contained provisions which some objectors

⁽¹⁾ Missouri Pac. R.R. Reorganization, 290 I.C.C. 477 (1954), approved in *In re Missouri Pac. R.R.*, 129 F. Supp. 392 (E.D. Mo.), *aff'd sub nom.* Missouri Pac. R.R. 5¼% S.S.B.C. v. Thompson, 225 F.2d 761 (8th Cir. 1955), cert. denied, 350 U.S. 959 (1956).

predicted "are sure to cause trouble."⁽²⁾ And so it has come to pass. The equity interests have been at odds and in litigation ever since.

MoPac's recapitalization upon its reorganization was structured so that the old preferred and common stock were replaced by two classes of stock, Class A and Class B. The Class A shares of the reorganized company were issued to the former preferred stockholders of MoPac, the debtor, with each share entitled to receive, when and as declared by the Board of Directors, noncumulative dividends, not to exceed \$5 annually, and in the event of dissolution or liquidation, the first \$100, together with any dividends declared and unpaid. The Class B shares were issued to the former common stockholders of the debtor, and after payment of the \$5 dividend to the Class A stock, each share of Class B stock is entitled to receive dividends, without restriction, as the Board of Directors may declare, and upon liquidation or dissolution of MoPac, the equity in excess of the Class A preferences. Each share of each class is entitled to one vote. The former preferred stockholders received approximately 1.9 million shares, and the former common stockholders received approximately 40,000 shares, so that 98% of the voting stock is held by the Class A stock and 2% by the Class B stock.

Obviously, the Class A stockholders have the power to elect MoPac's Board of Directors, as well as voting control with respect to other but not all corporate matters. On mergers, consolidations or reorganizations involving issuance of additional stock or the alteration of the rights of either class, approval by a majority of each class is required. Thus, in effect, the Class B stock has a veto power over such actions. In practical terms, the "ingenious" solution envisaged under the 1956 reorganization created a basic conflict between the two classes, with the equity ownership principally in the B stock, but with effective operating control in the A stock.

Mississippi began acquiring Class A stock in 1959 and by 1963 owned more than one million shares, constituting 58% of the outstanding Class A shares. It now owns 63%, or 1,158,395 shares out of a total outstanding of 1,864,052. Since 1963 it has elected the Board of Directors of MoPac. Alleghany, on the other hand, which has owned a majority of the outstanding Class B stock ever since it was issued upon the reorganization, now owns, subject to a voting trust, approximately 53%, or 21,243 shares, of the total outstanding 39,731 shares. Thus the disparity of interest between the two classes of stock is further aggravated by Alleghany's majority ownership of the B stock, which gives it an independent veto power over any corporate action that requires the separate approval of the B stock.

THE VOTING RIGHTS LITIGATION

The first litigation that the differing stockholders became embroiled in after the reorganization came in December 1963, when MoPac's Board of Directors proposed the consolidation of MoPac and its 83% owned subsidiary, Texas and Pacific Railway Company (T&P), into a new corporation, Texas and Missouri Pacific Railroad Company (T&M). An application was filed with the Interstate Commerce Commission for an order under section 5(2) of the Interstate Commerce Act authorizing the proposed consolidation and for the issuance of securities by T&M under section 20a of the Act. The plan provided for an exchange of each MoPac share, regardless of class, for four shares of the new corporation and for an exchange of the T&P stock (other than that owned by MoPac) on the basis of one share of T&P for 4.8 shares of the new company. MoPac's Board of Directors took the position that the Class B stockholders were not entitled to vote on the plan separately and apart from the Class A stockholders, and that it intended to submit the plan for approval to the collective vote of the Class A and Class B stockholders.

(2) *In re Missouri Pac. R.R.*, 129 F. Supp. 392, 397 (E.D. Mo. 1955). ICC Commissioner Mahaffie was the first to predict trouble ahead. In his reluctant concurrence of the reorganization plan, he said:

"The prior class 'A' stock is limited as to dividends and is noncumulative. It will be largely of a speculative character for some years at best. But the 'B' stock, for the present, and for the foreseeable future, principally valuable as a token for speculation. Consequently, its relation to the 'A' stock and to the dividends and income bonds which precede it is reasonably sure to cause trouble."

Missouri Pac. R.R. Reorganization, 290 I.C.C. 477, 624-25 (1954).

In view of Mississippi's ownership of a majority of the Class A stock, as well as all outstanding stock, the outcome of the vote on consolidation was virtually foreordained. Alleghany and other Class B stockholders filed actions in the United States District Court for the Eastern District of Missouri for a declaratory judgment that the plan required the approval of a majority of each of the two classes of stock and sought other relief. Upon a limited consolidation of the cases the district court held that MoPac's Articles of Association and the applicable federal and state law required the separate approval of each class of shareholders.⁽³⁾ The Court of Appeals reversed, holding that separate class approval was not required.⁽⁴⁾ On certiorari, the Supreme Court unanimously reversed the Court of Appeals, holding that:

"With reference to voting rights, we hold only that in a consolidation as proposed here, Missouri law must be applied and . . . that law requires the application of the Articles of Association of MoPac, which in turn, require the assent of the majority of the shareholders on a separate class-vote basis."⁽⁵⁾

Since a number of stockholders emphasize certain rhetorical statements in the Court's opinion,⁽⁶⁾ it is well to bear in mind the Court's precise holding, and further its statement: "We do not . . . reach the merits of the proposed plan . . ."⁽⁷⁾ The Court's ruling ended the proposed consolidation when in March 1967 MoPac and T&P abandoned their plan, but further litigation was ahead.

THE INSTANT ACTION

This action was instituted by plaintiff Levin in December 1967. Thereafter Alleghany and LeVasseur intervened pursuant to leave granted by this Court. In September 1968 Judge Bryan ordered that the action be maintained as a class action on behalf of all Class B stockholders. The thrust of the complaints of all three plaintiffs is directed toward the dividend policy with respect to the Class B Stock. From 1964 to 1971 the annual dividends paid on the A stock have been \$5 per share. During that same period annual dividends declared and paid on the Class B stock have been \$5 per share.

In substance, three separate claims are asserted against Mississippi and the three individual defendants.⁽⁸⁾ Under the first cause of action plaintiffs claim that the dividends declared and paid by MoPac have been unreasonably low; that Mississippi has misused its majority voting stock power by causing MoPac's Board of Directors to limit dividends on the Class B stock to \$5, the maximum permissible per share dividend payable on the Class A stock, despite the enormous differences in the equity value between the two classes, and notwithstanding the availability in each year of net income for increased dividends after meeting the requirements on the Class A stock.

The second cause of action charges a conspiracy by Mississippi and members of MoPac's Board of Directors to "freeze out" the Class B stockholders by improperly limiting the dividends paid on the Class B stock, making public statements denigrating the market value of the Class B stock, and attempting to appropriate the equity of the Class B stockholders through the plan of consolidation of MoPac with T&P, proposed in 1967.

The third cause of action further alleges that the various acts and conduct alleged in the second cause of action were in violation of section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5, promulgated thereunder, and of defendants' common law fiduciary duty owed the Class B stock-

(3) *Slayton v. Missouri Pac. R.R.*, 233 F. Supp. 747 (E.D. Mo. 1964).

(4) *Mississippi River Fuel Corp. v. Slayton*, 359 F.2d 106 (8th Cir. 1966).

(5) *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 170 (1967).

(6) *See, e.g., id.* at 169: "The plan proposes to exchange four shares of stock of T&M for one share of MoPac Class B, which . . . is like exchanging four rabbits for one horse."

(7) *Id.* at 170.

(8) Plaintiff Levin also attacks the failure of defendants to split the Class B stock or to take similar steps to improve its marketability; however, no specific relief is sought.

holders. The plaintiffs seek judgment that the Court direct MoPac to pay reasonable dividends for the past years, from 1964 to 1971, to all Class B stockholders; that MoPac be directed to pay reasonable dividends on the Class B stock in the future; and to award plaintiffs their costs, expenses and reasonable counsel fees incurred in the prosecution of this action.

In addition to the class action claims, Levin and LeVasseur separately assert derivative claims on behalf of MoPac. One alleges that the defendants have failed to cause MoPac to replace the Class A stock with debentures or other interest bearing securities, which would materially reduce MoPac's income tax; however, as to this derivative claim, no specific relief is sought. A further derivative claim on behalf of MoPac is for the recovery of the costs and expenses incurred by it in connection with the 1963 T&P consolidation plan and the Class B voting rights action.

The defendants in their answers have denied the material allegations of the complaints and set up affirmative defenses, including, with respect to the dividend cause of action, business justification.

With the issues thus posed, the parties engaged in extensive pretrial discovery procedures commencing in 1968. The case was assigned to this Court in midyear 1972, and after a pretrial conference the trial was scheduled to commence on December 4, 1972. As the trial date approached, the litigants had virtually completed all pretrial activities, which included depositions of parties and witnesses, as well as interrogatories propounded to one another, which in due course were answered. In addition, plaintiffs had obtained, read and evaluated approximately 10,000 pages of documents from the files of MoPac and related sources. The inspection of these documents took over ninety man-days' work by plaintiffs' counsel and additional time by an accountant and securities expert, retained specially for that purpose. It is evident that the pretrial discovery on both sides was as thorough as could be and all pertinent facts exposed by the litigants in preparation for a contested trial. While engaged in concluding their expanded pretrial activities, the parties concurrently intensified efforts to effect an amicable settlement. Previously, during the pendency of this case, and even before, attempts to reach an accommodation had failed. The renewed extended negotiations were participated in not only by the lawyers representing the parties, executives and financial officers of the corporations involved, but also by independent financial analysts and investment advisers specializing in corporate and transportation finance. The negotiators recognized that central to a lasting resolution of the conflict between the two stockholder interests was the elimination of the underlying cause of the strife, a result not obtainable whatever the final outcome were the case to proceed to trial, and it was this concept which led to a settlement on the basis of a restructured capitalization.

THE TERMS OF THE PROPOSED SETTLEMENT

If the settlement is approved by the Court, a Plan of Recapitalization (Plan) and a proposed Amendment to MoPac's Articles of Association are to be submitted to stockholders for their approval, to bring about the following:

(1) each share of Class A stock would be converted into one share of \$5 cumulative preferred stock, with a liquidating preference of \$100 per share, convertible into one share of new common after one year following ICC authorization of the issuance of new securities and redeemable at the option of MoPac for \$100 per share, after December 31, 1975. This would require the issuance of 1,864,052 shares of the new stock to the present holders of the Class A stock, of which Mississippi would be entitled to receive 1,158,395 shares;

(2) each share of Class B stock would be converted into sixteen shares of new common stock and \$850 cash. This would require the issuance of 635,696 shares of new common stock to the present holders of Class B stock, of which Alleghany would be entitled to receive 339,888 shares; this would require a cash payment by MoPac of \$33,771,350;

(3) both preferred stock and common stock would have one vote per share;

(4) the Plan and amendment would have to be approved by 75% of the outstanding shares of each class of MoPac stock, including a majority of the shares of each class other than those held by Mississippi and Alleghany—that is, a majority of the minority stockholders of each class;

(5) the issuance of the new shares would have to be approved by the Interstate Commerce Commission;

(6) upon such approvals, Mississippi is required to make a cash tender offer to all Class B stockholders for at least 400,000 shares (approximately 63%) of the new common stock, at \$100 per share, and Alleghany (but not the minority B shareholders) must tender all its new common stock (339,888 shares). If more than 400,000 shares are tendered, Mississippi may purchase the shares on a pro rata basis; this would require a cash payment by Mississippi of at least \$40,000,000;

(7) all claims asserted in this action and any other claims against the defendants which are based upon or arise from any of the matters alleged in the complaints, regardless of the legal theory upon which they are based, will be dismissed with prejudice;

(8) fees awarded to plaintiffs' attorneys will be paid by MoPac and Mississippi.

If the recapitalization and tender offer are not consummated by December 31, 1973, the settlement agreement would be terminable at the option of Alleghany, Mississippi or MoPac.

EVALUATION OF THE SETTLEMENT

The function of the Court on this application for approval of the settlement is not, as some objectors suggested at the hearing and others have since urged in their communications to the Court, to reopen and enter into negotiations with the litigants in the hope of improving the terms of the settlement to meet their respective objections; nor is the Court called upon to substitute its business judgment for that of the parties who worked out the settlement.⁽⁹⁾ So, too, the Court is cautioned not to turn the settlement hearing into a trial or a rehearsal of a trial.⁽¹⁰⁾ To do so would defeat the very purpose of the compromise to avoid a determination of the sharply contested issues and to dispense with expensive and wasteful litigation. The Court's role is a more "delicate one,"⁽¹¹⁾ which requires a balancing of likelihoods rather than an actual determination of the facts and law in passing upon whether the proposed settlement is fair, reasonable and adequate to the Class B stockholders and MoPac.⁽¹²⁾ This appraisal requires the Court to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance . . . is the need to compare the terms of the compromise with the likely rewards of litigation."⁽¹³⁾ With that guidance, we turn to the task at hand.

At the outset is the simple fact that the interests of each class of stockholders is tied up with the welfare of MoPac. Its operating efficiency and its competitive strength spell out economic success, which alone gives value to its stock, whatever the class. MoPac is in competition with a number of railroads, some of which, following trends in the industry and consistent with the congressional policy of encouraging consolidation of the nation's railroads into a limited number of systems,⁽¹⁴⁾ have merged with other lines to effect economies and to improve efficiency. Other competitors are in the process of

(9) *Schleiff v. Chesapeake & Ohio Ry.*, 43 F.R.D. 175, 178 (S.D.N.Y. 1967); *Glicker v. Bradford*, 35 F.R.D. 144, 151 (S.D.N.Y. 1964).

(10) *Newman v. Stein*, 464 F.2d 689, 692 (2d Cir.), *cert. denied*, . . . U.S. . . . (1972).

(11) *Id.* at 691; see also *United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co.*, 447 F.2d 647 (7th Cir. 1971).

(12) See *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971).

(13) *Protective Comm. v. Anderson*, 390 U.S. 414, 424-25 (1968). *Accord*, *Newman v. Stein*, 464 F.2d 689, 692 (2d Cir.), *cert. denied*, . . . U.S. . . . (1972). *Saylor v. Lindsley*, 456 F.2d 896, 904 (2d Cir. 1972). *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). With regard to weighing the benefits of the compromise against the likely rewards of litigation, see *Purcell v. Keane*, 54 F.R.D. 455, 460 (E.D. Pa. 1972); *Glicker v. Bradford*, 35 F.R.D. 144, 152 (S.D.N.Y. 1964). *But cf.* *Norman v. McKee*, 431 F.2d 769, 774 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971).

(14) See *Penn. Central Merger and N. & W. Inclusion Cases*, 389 U.S. 486, 492 (1968); see also *N.Y. Times*, Feb. 16, 1973, at 1, col. 7.

effecting consolidations. These merged, and the likely to be merged, competitors pose a potential threat to MoPac by depriving it of all but its short haul market and in other respects—as MoPac's chief executive officer states, “[it] could prove competitively ruinous.” There can be little doubt that to maintain its competitive strength it is imperative that MoPac link itself with another system. Yet its efforts in this direction have been thwarted because of the disparate interests of the two classes of shareholders. Specific instances have been cited where other railroads have shied away from proposed consolidations because of the stockholders situation.

MoPac, to protect its competitive position against merged and other competing lines, has purchased through the years controlling securities of other railroads, a matter discussed hereafter. However, the stock acquisition method does not yield all the advantages of a merger. The elimination of the present capital structure with its built-in conflict between the two classes, which has foreclosed merger to date, will permit MoPac's officials to pursue merger prospects; it will also permit its officials to function full time in its interests and its stockholders'—thousands upon thousands of hours have been devoted to litigation instead of to railroad operation.⁽¹⁵⁾

Another benefit favoring the settlement is that it provides the effective means for payment of greater dividends and thus meets in part the demands of plaintiffs. The Board of Directors anticipates that the annual dividend rate will be \$5 per share on each class of stock to be issued under the Plan. With the Class B stockholders receiving sixteen shares of new stock for their present one share (in addition to the \$850 cash), the dividend return will be \$80 per annum as against the current \$5 per share. Mississippi, committed to the purchase of at least 400,000 shares of the new common stock (apart from such additional common stock it may own by reason of conversion of its preferred after one year) would have an economic interest in the declaration of dividends on the new common stock.

Other advantages are evident. The conversion of the Class B stock into sixteen shares makes them more marketable and to this extent meets the derivative claim that the defendants failed to split the Class B stock, thereby broadening public interest in it. Additionally, at the present time the Class B stock elects no directors. Under cumulative voting the new common stock would have the means of representation on the Board of Directors.

We next consider a, if not the, most important factor—the probability of plaintiffs' success upon a trial, and, if successful, “the likely rewards of [the] litigation.” The extensive pretrial discovery conducted by the parties has exposed their respective strengths and weaknesses.⁽¹⁶⁾ While each litigant professes confidence in his cause, it is with recognition of the force of a countervailing position and also, as all are aware, that “[s]tockholder litigation is notably difficult and unpredictable.”⁽¹⁷⁾

Plaintiffs have the burden of proof as to their claims. To prevail, they must establish under the allegations of their complaints that MoPac's Board of Directors, in subservience to the wishes of Mississippi, abused their discretionary powers and arbitrarily and unreasonably withheld dividends in each year, although MoPac's condition warranted such additional dividends.⁽¹⁸⁾ Since the determination of whether a dividend should be declared rests in the first instance with the Board of Directors,⁽¹⁹⁾ courts may intervene only when there has been bad faith, neglect or abuse of discretion.⁽²⁰⁾ This is indeed a

(15) Cf. *Denicke v. Anglo Cal. Nat'l Bank*, 141 F.2d 285, 288 (9th Cir.), *cert. denied*, 323 U.S. 739 (1944), *Derdiarian v. Futterman Corp.*, 38 F.R.D. 178, 181 (S.D.N.Y. 1965).

(16) Cf. *Saylor v. Lindsley*, 450 F.2d 896, 901 (2d Cir. 1972); *Cherner v. Transitron Electronic Corp.*, 221 F. Supp. 48, 51 (D. Mass. 1963).

(17) *Zerkle v. Cleveland Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971); cf. *Ferguson v. Birrell*, 190 F. Supp. 506, 509 n.10 (S.D.N.Y. 1960), *aff'd sub nom. Ferguson v. Tabah*, 288 F.2d 665 (2d Cir. 1961).

(18) Cf. *Guttman v. Illinois Cent. R.R.*, 91 F. Supp. 285 (F.D.N.Y. 1950), *aff'd*, 189 F.2d 927 (2d Cir.), *cert. denied*, 342 U.S. 867 (1951); *W. Q. O'Neill Co. v. O'Neill*, 108 Ind. App. 116, 25 N.E.2d 656 (1940); *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919); *Walsh v. Walsh*, 285 Mo. 181, 226 S.W. 236, 245 (1920); *Patton v. Nicholas*, 154 Tex. 385, 279 S.W.2d 848 (1955).

(19) *See Wabash Ry. v. Barclay*, 280 U.S. 197, 203 (1930); *see also New York, L.E. & W. R.R. v. Nickals*, 119 U.S. 296, 307 (1886).

(20) *See Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668, 681-82 (1919); 11 W. Fletcher, *Private Corporations* § 53.25 (rev. ed. 1971) and cases cited therein.

heavy burden,⁽²¹⁾ which plaintiff's experienced counsel frankly acknowledge. However, they stress that in each year after payment of debt, other corporate requirements and dividends on the Class A stock, substantial earnings were available to pay a much higher dividend than \$5 on the Class B stock. This by itself, however, would not carry the day for the plaintiffs. The directors who were deposed swore that the declaration of dividends in each year was based upon prudent business judgment, which took into account MoPac's current and long range needs. This basically is the defense to plaintiffs' charges. The defendants emphasize that since the merger route was foreclosed to MoPac, it was essential, in order to protect its competitive position, to purchase large blocs of securities in other railroads, which required large cash expenditures; also that cash was used or required for equipment, up to date maintenance, capital improvement programs, current and projected, as well as other purposes vital to MoPac's competitive standing. To underscore their defense of prudent business judgment, the defendants refer to MoPac's Articles of Association which give the Board of Directors broad powers to set aside reserves and make such other provisions as the Board "shall deem to be necessary or advisable for working capital, for expansion of the business of the Company . . . and for any other purpose of the Company."⁽²²⁾ The Court has reviewed the pretrial material on the issue of prudent business judgment and the defendants' position thereon cannot be said to be lacking in substance. In any event, it points up the issue as a substantial one to be resolved upon a trial. Plaintiffs, upon the whole case, would have the burden of establishing that the directors, notwithstanding the explanation of the factors which influenced their judgment, were in fact acting in bad faith or in an arbitrary manner. Directors are permitted a very liberal discretion in determining matters of business policy.⁽²³⁾ And if that discretion has been exercised in good faith, that it may have been injudicious or even if the Court believed a different policy were desirable, would not, by itself, be sufficient to sustain plaintiffs' burden.⁽²⁴⁾

Moreover, even if plaintiffs should prevail upon the merits on the issue of additional dividends, it would not necessarily mean a total recovery. The Court would face the question of determining what would have constituted adequate dividends in each year during the period from 1964 through 1971—a decision requiring consideration of numerous variables, making the likelihood of substantial recovery questionable. The problem, as acknowledged by all parties, is difficult of solution. As counsel for Allegheny recognizes:

"Thus, if a finding of wrongdoing were made, there would remain the problem of proving the amount of additional dividends which should have been paid. The effect of this difficult problem of proof on the outcome of the lawsuit might well depend upon which party was deemed to have the burden of proof. If plaintiffs were required to prove that the dividends paid by MoPac were inadequate, that burden could have remained unmet and recovery could have been denied. On the other hand, if defendants were required to prove the adequacy of the dividends paid, they might well have failed to meet that burden, and as a result plaintiffs might have won a substantial recovery."⁽²⁵⁾

Plaintiffs' problems are further compounded since it is doubtful that the Court would retain jurisdiction, as plaintiffs request, in order to monitor the MoPac Board's future dividend policy which, initially, is the Board's responsibility. Such future judicial supervision of MoPac's dividend policy would require the Court to make complex business decisions from year to year as to amounts to be

(21) *Staats v. Biograph Co.*, 236 F. 454, 457 (2d Cir. 1916).

(22) MoPac's Articles of Association, Article VII D(1).

(23) *Cf. Fielding v. Allen*, 99 F. Supp. 137, 142 (S.D.N.Y. 1951); *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668, 681-82 (1919); *Park v. Grant Locomotive Works*, 40 N.J. Eq. 114, 117-18, 3 A. 162, 165 (Ch. 1885), *aff'd*, 45 N.J. Eq. 244, 19 A. 621 (Ct. Err. & App. 1888); *Leslie v. Lorillard*, 110 N.Y. 519, 532, 18 N.E. 363, 365 (1888); *Case v. Woodruff* 49 N.Y.S.2d 625, 643 (Sup. Ct. 1944).

(24) *Cf. Taussig v. Wellington Fund, Inc.*, 313 F.2d 472, 479 (3d Cir.), *cert. denied*, 374 U.S. 806 (1963); *Everett v. Phillips*, 288 N.Y. 227, 43 N.E.2d 18 (1942); *Bourne v. Bourne*, 240 N.Y. 172, 177-78, 148 N.E. 180, 181 (1925); *Gallagher v. New York Dock Co.*, 19 N.Y.S.2d 789, 800-01 (Sup. Ct. 1940), *aff'd*, 263 App. Div. 828, 32 N.Y.S.2d 348 (2d Dep't 1942); *see also Briggs v. Spaulding*, 141 U.S. 132 (1891); *Masterson v. Pergament*, 203 F.2d 315, 330 (6th Cir.), *cert. denied*, 346 U.S. 832 (1953).

(25) Affidavit of M. Lauck Walton, Jan. 23, 1973, at 23.

retained out of earnings in order to determine the net income available for the declaration of dividends. In end result, were the Court to retain jurisdiction, it would be required to function as MoPac's sole director in place of its duly elected Board of Directors.

Some objectors cite *Dodge v. Ford Motor Co.*⁽²⁶⁾ as giving strength to plaintiffs' position. However, that court adopted the general principle against judicial intervention in corporate affairs. The *Dodge* court did conclude that plaintiffs had produced sufficient evidence to prove that the directors were running the corporation for the benefit of persons other than the stockholders and therefore justified in requiring the payment of reasonable dividends. The facts of the *Dodge* case are by no means similar to those in the instant case. Similarly, *Mayflower Hotel Shareholders Protective Committee v. Mayflower Hotel Corp.*⁽²⁷⁾ merely demonstrates that the plaintiffs have alleged a valid cause of action, not necessarily a successful one.

As to the conspiracy charge—that Mississippi conspired with others by various acts and means to “freeze out” the Class B stockholders or to depress the market price of the stock—plaintiffs face perhaps an even heavier burden, since it is conceded that no tangible or direct evidence has thus far been unearthed to sustain the charge; perforce, plaintiffs would have to rely upon circumstantial evidence and urge that the fact finder draw inferences therefrom of wrongful motive and conspiratorial conduct.

The third cause of action, based upon defendants' acts and conduct in connection with the alleged conspiracy to “freeze out” the B stockholders and allegedly resulting in violations of section 10(b) of the Securities Exchange Act, the rule thereunder and defendants' common law fiduciary duties, also presents problems of proof to plaintiffs. Plaintiffs here charge that during the existence of the alleged conspiracy Mississippi and the defendant T. C. Davis bought and sold shares of B stock; that the objective of the scheme was to depress the market of the B stock, thereby forcing plaintiffs to sell at prices much below their true value. Even considering the current liberalization of Rule 10b-5,⁽²⁸⁾ and that plaintiffs' position may have some support,⁽²⁹⁾ plaintiffs must carry the burden of proving that defendants' actions were fraudulent⁽³⁰⁾ or unjustified,⁽³¹⁾ and that such conduct in some way caused plaintiffs' injury.⁽³²⁾ As to the latter, it is interesting to note that plaintiffs do not seek separate relief on their 10b-5 claim; instead, they urge that the damages be measured by the amount of reasonable dividends allegedly withheld by the defendants during 1964-1971. By invoking this measure of damages, plaintiffs also face the same problems already discussed as to the extent of recovery under the dividend cause of action.

As to the derivative causes of action, one claim seeks to hold Mississippi and the individual defendants accountable for the expenses incurred by MoPac in connection with the plan to consolidate MoPac with T&P, which was abandoned following the Supreme Court decision. Even were the plaintiffs to establish that the proposed consolidation was not in MoPac's interest but calculated to favor Mississippi,⁽³³⁾ the likelihood of recovery on this claim is diminished by the holding by the Eighth Circuit Court of Appeals that MoPac was not responsible to the plaintiffs for their legal fees and expenses in the voting rights litigation.⁽³⁴⁾ Additionally, plaintiffs would be hard put to prove that the

(26) 204 Mich. 459, 170 N.W. 668 (1919).

(27) 173 F.2d 416 (D.C. Cir. 1949).

(28) See, e.g., *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971).

(29) See *Cochran v. Channing Corp.*, 211 F. Supp. 239 (S.D.N.Y. 1962).

(30) See *List v. Fashion Park, Inc.*, 340 F.2d 457 (2d Cir.), cert. denied, 382 U.S. 811 (1965).

(31) As to justification, the same problems will be encountered here as in the dividend cause of action.

(32) Cf. *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12-13 (1971); *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540, 546 (2d Cir. 1967).

(33) As to the merits, the Court of Appeals for the Eighth Circuit recognized the issues in the voting rights litigation were complex and that no court had passed upon the fairness of the plan itself. *Missouri Pac. R.R. v. Slayton*, 407 F.2d 1078, 1082, 1083 (8th Cir.), cert. denied, 395 U.S. 937 (1969).

(34) *Missouri Pac. R.R. v. Slayton*, 407 F.2d 1078 (8th Cir.) cert. denied, 395 U.S. 937 (1969).

proposed consolidation of MoPac with T&P was not a justifiable business decision by the MoPac Board. As already noted, the Supreme Court expressly disavowed that it passed upon the merits of the proposal.

To state all the foregoing, of course, is no forecast of result upon a trial. It is simply to recognize, as the principals themselves do, that the action presents many obstacles, particularly for plaintiffs, who have the burden of proof. With the defendants vehemently denying wrongful conduct, were the case to be tried, all the issues would be vigorously contested, with the outcome obviously uncertain. The probability of ultimate success at best can only be cautious prophecy.

Having examined the benefits of the settlement and the prospect of success upon a trial, other factors merit consideration. As all parties stress, were the plaintiffs to prevail upon the trial, or whatever its outcome, there would still remain the root cause of the conflict between the two classes of stockholders—the separation between equity ownership (principally in the B stock) and management control (in the A stock). And as long as it exists there will be continued hostility between the two and the potential of renewed litigation. Its elimination will be an advantage to all concerned. The settlement also provides for the elimination of Alleghany's ownership of equity stock, which Mississippi is to acquire. With Alleghany no longer an opposing force, it should mean stability in management and operation of MoPac.

Another factor favoring the settlement, but by no means determinative,⁽³⁵⁾ is the unanimous judgment of all the parties, their counsel and their investment analysts and advisers that its terms are eminently fair. To be sure, the final judgment as to the fairness of the proposal is the responsibility of this Court, but their joint recommendation is entitled to substantial weight,⁽³⁶⁾ particularly so in the instant case. A unique situation exists here not present in the usual stockholders' suit recommended to the courts for settlement, where oftentimes the plaintiffs representing the class own a relatively small economic interest in the corporation. Alleghany's self-interest as the owner of 53% of the Class B stock gives some assurance that it negotiated to obtain the best possible terms for that group vis-à-vis the Class A stockholders.⁽³⁷⁾ The other two plaintiffs, minority Class B stockholders, each also owns a substantial number of shares reflecting a heavy investment in the stock. Their counsel have acted independently of Alleghany's counsel in representing the interests of the Class B minority shareholders. These three plaintiffs and their counsel over a long period have been alert to enforce the rights of Class B stockholders. The lawyers for the plaintiffs in this action also represented them in the Missouri voting rights case and, over Mississippi's strong opposition, successfully upheld the right of the Class B stockholders as a separate group to vote upon consolidations. They are particularly knowledgeable with respect to the basic facts of MoPac and the hard core issues of this litigation; they are especially experienced in this field of law. Additionally, the parties, during the course of the litigation and in the negotiations, had the benefit of the advice of experienced independent railroad investment advisers and analysts. The record leaves no room to doubt that the negotiations were conducted in good faith and at arm's length, with the Class B stockholders represented by sophisticated, if not hardened, negotiators who deem the settlement the best result obtainable without a trial of the issues on the merits.⁽³⁸⁾

Finally, the fairness of the settlement is emphasized by the provision that, despite Mississippi's and Alleghany's effective voting control by reason of their respective majority ownership of the Class A

(35) *Cf. Cohen v. Young*, 127 F.2d 721, 725 (6th Cir. 1942).

(36) *See Cannon v. Texas Gulf Sulphur Co.*, 55 F.R.D. 306, 316 (S.D.N.Y. 1971); *Percodani v. Riker-Maxson Corp.*, 50 F.R.D. 473, 477 (S.D.N.Y. 1970); *Schleiff v. Chesapeake & O. Ry.*, 43 F.R.D. 175, 179 (S.D.N.Y. 1967); *Glicker v. Bradford*, 35 F.R.D. 144, 152 (S.D.N.Y. 1964); *Fielding v. Allen*, 99 F. Supp. 137, 144 (S.D.N.Y. 1951).

(37) *Cf. Cherner v. Transatron Electronic Corp.*, 221 F. Supp. 48, 51 (D. Mass. 1963).

(38) *Cf. Mutual Shares Corp. v. Genesco, Inc.*, [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶92,315 (S.D.N.Y. 1968); *Cherner v. Transatron Electronic Corp.*, 221 F. Supp. 48, 51 (D. Mass. 1963).

The fact that the form of the settlement decided upon is somewhat unusual and that it includes some benefits which cannot be evaluated in financial terms does not militate against its acceptance; the parties are permitted great freedom in shaping the form of settlement consideration. *Cf. Dertadian v. Futterman Corp.*, 38 F.R.D. 176 (S.D.N.Y. 1965); *Manacher v. Reynolds*, 39 Del. Ch. 401, 165 A.2d 741, 747 (Ch. 1960); *Levy v. Babb*, 39 Misc. 2d 648, 241 N.Y.S.2d 642 (Sup. Ct. 1963).

and B stock, sufficient under MoPac's charter to put through a recapitalization, the Plan cannot be effected without the approval of a majority of the other stockholders of each class⁽³⁹⁾—in effect, acceptance of the settlement rests with them regardless of the desires of Mississippi and Alleghany.

The factors militating in favor of the settlement are indeed substantial, but a number of Class B stockholders challenge it as unfair and inadequate.

THE OBJECTIONS

At the hearing on this motion, Class B stockholders or their attorneys appeared and others communicated with the Court by letter to voice their objections to approval of the Plan. There are eighteen objectors who own a total of approximately 1,167 shares.⁽⁴⁰⁾ They concentrate their attack on the alleged inadequacy of the exchange for their holdings; its tax consequences; they also contend the settlement is unfair as between them and Alleghany as the majority Class B stockholder. Almost all the objectors agree that the litigation should be settled, but on better terms than those proposed; failing that, they urge rejection of the settlement.

The primary objection is that the package exchange of \$850-16 shares of new common stock for each share of present Class B stock yields substantially less than the value of the shares to be surrendered. The substance of this challenge rests principally upon the existing rights of the Class B stock as against those of the Class A stock. A major premise in the objectors' attack is their view that realistically the Class A stock is a noncumulative preference stock limited to a \$5 per year dividend and to \$100 per share upon liquidation; that realistically the Class B stock is the common stock entitled to unlimited dividends as may be declared and to all MoPac's equity above the \$100 per share attributable to the Class A stock. These differences are the hard core of the objectors' valuation and other contentions. However, merely to state the differences in rights between the two classes of stock is too simplistic an approach; countervailing factors cannot be ignored. A factor of force is that the Class A stock, whether termed a "preference" or "hybrid" stock, or otherwise, has one vote per share, just as each share of Class B stock, with the result that the Class A stock not only controls the management of MoPac; but also can and, as plaintiffs charge, does exercise this control to withhold dividends from the Class B stock, whereas the Class B stock, a small minority of all outstanding shares, has the veto power over mergers, consolidations and other important corporate actions, and yet it is without sufficient voting strength to elect even one director. Another countervailing factor which cannot be disregarded is that the Class A stock, while noncumulative, is entitled to receive dividends out of retained earnings in each year even if current earnings for a particular year may be insufficient to cover dividend requirements on the A stock. Consideration of the objectors' contentions with respect to the value of their stock cannot ignore these elements. Thus we turn to the specific objections.

Almost all the parties are in accord that the new common shares can be valued at about \$100 per share, so that the \$850-16 share package conversion rate equals approximately \$2,450 for each present Class B share. But objectors and proponents differ on the present value of the B stock, as well as the A stock. It would serve no useful purpose to analyze in detail their computations whereby they evaluate the present worth of each class. Their differing estimates derive from the methods used to value the shares.

Most objectors evaluate the shares by their book value. Several apply the capitalization of net earnings method; in this instance, they allocate to the Class B stock all of MoPac's annual net earnings above the annual Class A dividend requirements. Their position is that the earnings of the Class A

(39) Compare *Winkelman v. General Motors Corp.*, 48 F. Supp. 490, 495 (S.D.N.Y. 1942).

(40) The 39,371 outstanding Class B Shares are held by some 950 individuals or corporations. That a comparatively small number of holders of shares reflecting a small percentage of the total outstanding oppose, as against a great majority who favor, the settlement does not relieve the Court of its function in passing upon the fairness of the proposal. See *Protective Comm. v. Anderson*, 390 U.S. 414, 435 (1968); cf. *American United Mutual Life Ins. Co. v. City of Avon Park*, 311 U.S. 138, 148 (1940).

stock cannot exceed its maximum dividend, that is, \$9,319,000, or \$5 per share, and consequently the balance of each year's earnings should be allocated to the Class B stock. By their respective methods the objectors calculate that the present worth of each share of Class B stock ranges from somewhat over \$4,000 to the unrealistic, if not astronomical, figure of \$25,000. Those objectors who capitalize net earnings as allocated by them to the Class B stock estimate, at a price-earnings ratio of 10-1, its value at \$4,450 per share. At a 9-1 ratio, it would be \$4,005 per share (1972 earnings).

The proponents, in evaluating the present worth of the two classes of stock, also apply the capitalization of recent earnings method (1971-1972). However, their method of allocation of earnings differs from that of the objectors. Instead of deducting the Class A maximum annual dividend requirement from net earnings, the proponents take into account the market value of the Class A stock which, shortly before the announcement of the settlement, was selling between \$70-75 per share.⁽⁴¹⁾ They capitalize MoPac's earnings for the two years on a 9-1 basis, resulting in its capitalized value of \$225,000,000 to \$243,000,000. The market value of the Class A stock is deemed its true value, and accordingly its aggregate market value is deducted from MoPac's capitalized value and the difference allocated to the Class B stock, with the end result that the Class B stock is valued at an average of \$2,365 per share; a 10-1 capitalization rate would bring the average value somewhat higher.

Before considering the respective contentions, it is desirable to emphasize the Court's function on this application, already referred to, particularly so, since a number of objectors advance their arguments of stock valuation as if this were a proceeding under section 77 of the Bankruptcy Act,⁽⁴²⁾ where the phrase "fair and equitable," a term of art,⁽⁴³⁾ requires recognition of priority rights of senior securities owners on the basis of full compensatory value. The Court here is not called upon to make a definitive assessment of the value of each class of stock, old or new—that is not even a requirement were the proceeding one under section 77,⁽⁴⁴⁾ where with its standard of "fair and equitable," it is recognized that "the pretenses of exactitude" in determining a dollar value for a railroad property is somewhat illusory.⁽⁴⁵⁾ The Court here is concerned with a proposed settlement of a lawsuit and whether its terms, taking into account the probabilities of success upon a trial, and all pertinent factors, are "fair, reasonable, and adequate . . . terms [that] are general and cannot be measured scientifically."⁽⁴⁶⁾ In passing upon a proposed settlement of a stockholder's litigation, the standard "fair, reasonable and adequate" is not to be equated with "fair and equitable," applicable to a proposed railroad reorganization under the Bankruptcy Act. In the compromise of a stockholder's lawsuit there necessarily come into play "practical adjustments,"⁽⁴⁷⁾ elements of give and take by the respective interested parties, depending upon their strengths and weaknesses in the litigation;⁽⁴⁸⁾ and, of course, the uncertainty of its outcome, as well as the rewards, if successful, are important considerations in the process of compromise and concession.

First, as to book value as a method of valuation. The authorities are in agreement that book value is of little significance in appraising the value of stock; that what is of prime significance is a corporation's earning potential based on past experience.⁽⁴⁹⁾ The contention made by the objectors as to the change in equity between the two classes of stock is related to the book value concept. There appears to be no dispute that should the new preferred (1,864,052) share be converted into new common, the equity

(41) Consideration was given to the effect of the public announcement of the proposed settlement.

(42) 11 U.S.C. § 205.

(43) *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 115 (1939).

(44) *See Group of Institutional Investors v. Chicago, M., St. P. & Pac. R.R.*, 318 U.S. 523, 564-65 (1943).

(45) *Id.* at 565.

(46) *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 740 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

(47) *Cf. Group of Institutional Investors v. Chicago, M., St. P. & Pac. R.R.*, 318 U.S. 523, 565 (1943).

(48) *See Masterson v. Pergament*, 203 F.2d 315, 330 (6th Cir.), *cert. denied*, 346 U.S. 832 (1953); *Percodani v. Riker-Maxson Corp.*, 50 F.R.D. 473, 477 (S.D.N.Y. 1970).

(49) *Cf. Ecker v. Western Pac. R.R.*, 318 U.S. 448, 483 (1943); *Consolidated Rock Prods. Co. v. Du Bois*, 312 U.S. 510, 525-26 (1941).

position of the B stockholders would be reduced from 61½% to 25½%. The objectors and proponents differ as to the importance of the shift in equity. The terms equity and book value are essentially synonymous.⁽⁵⁰⁾ They would have relevance if there were the prospect of MoPac's liquidation⁽⁵¹⁾ or a takeover of the railroads by the government. Neither liquidation nor the nationalization of the railroads of the country is an imminent likelihood. Judge Learned Hand's sage observation of the fallacy of measuring the value of shares by their book value is as sound today as when he stated it almost fifty years ago:

"The suggestion that the book value of the shares is any measure of their actual value is clearly fallacious. It presupposes, first, that book values can be realized on liquidation, which is practically never the case; and, second, that liquidation values are a measure of present values. Everyone knows that the value of shares in a commercial or manufacturing company depends chiefly on what they will earn, on which balance sheets throw little light. . . ."⁽⁵²⁾

Next, as to the capitalization of earnings method, it has been already noted that the difference in valuation between objectors and proponents of the Class A and Class B stock results from different methods of allocating earnings to the two. Since the matter is one of judgment, there is room for disagreement. The Court has examined the submissions of the parties on this subject and is persuaded that the method of valuation, which takes into account the market value of the Class A shares and the underlying factors in its support offered by an expert retained to give an independent evaluation, is of substance and merits consideration.⁽⁵³⁾ The expert, after taking into account the market value of the Class A stock, valued the Class B stock at \$2,365 per share.⁽⁵⁴⁾

The Class A stock is listed on the New York Stock Exchange, is traded in a broad market, and almost 700,000 shares are held by the public. With an active market for the Class A stock, it cannot be said that to ascribe the market price as its fair value is unreasonable. The market evaluation of a stock may reflect a more realistic appraisal of its value than a conceptual evaluation. Theory must yield to the reality of the market place, "the true appraiser."⁽⁵⁵⁾ Indeed, to quote Judge Learned Hand again: "When all is said, the value is nothing more than what people will pay for. . . ."⁽⁵⁶⁾

The Class B stock is traded on the over-the-counter market; the market is thin; and the traders are few. The market for the Class B stock has never approached the values urged by the objectors. The range has been between \$1,100 and \$2,500 per share.⁽⁵⁷⁾ The conclusion is warranted that the public market, in pragmatic terms, has taken into account MoPac's unusual capitalized structure, whereby a so-called preference stock has voting rights that control not only MoPac's management, but also its dividend policy with the power to withhold dividends from the Class B stock, and accordingly appraised the value of the two classes of stock based upon their respective power, rights and restrictions.

Another factor suggests that the proponents' experts' valuations are closer to the mark than the objectors' valuations. Alleghany, as the majority owner of the Class B stock, has, through the years, been the principal antagonist to Mississippi, the majority owner of the Class A stock. Widely divergent

(50) See Accountants' Handbook § 3, at 11 (R. Waxon ed. 1965); Prentice-Hall Encyclopedia of Business Finance 78-79, 237 (1960).

(51) MoPac's financial expert is of the view that were the corporation to liquidate it would probably be in such poor financial condition that no equity would be available for distribution to stockholders. Affidavit of F. L. Lee Jones, Jan. 23, 1973, at 6.

(52) *Borg v. International Silver Co.*, 11 F.2d 147, 152 (2d Cir. 1925).

(53) Affidavit of F. L. Lee Jones, Jan. 23, 1973.

(54) Alleghany's chief financial officer also took into account the market value of the Class A stock in appraising the value of the Class B stock and reached approximately the same valuation. Affidavit of John J. Burns, Jan. 22, 1973.

(55) *New York, N.H. & H.R.R., 1st Mtg. 4% B.C. v. United States*, 305 F. Supp. 1049, 1069 (S.D.N.Y. 1969) (Weinfeld J. dissenting), *vacated sub nom. New Haven Inclusion Cases* 399 U.S. 392 (1970).

(56) *Borg v. International Silver Co.*, 11 F.2d 147, 152 (2d Cir. 1925).

(57) While the Class B stockholders contend that the market price of their stock has been depressed by the acts of the defendants, we deal with the fact situation as it exists. Whether the market price of the Class B shares is the consequence of defendants' alleged conduct is one of the issues to be decided were the case to go to trial. Similarly, objections directed at the failure of MoPac to report the earnings allocable to the B shares, as to which defendants offer an explanation, also go to the merits of plaintiffs' claim, not to the fairness or adequacy of the settlement.

views as to the B stock's value have, up to the present, foreclosed any compromise. Alleghany's acceptance of the settlement as a disposition of their longstanding controversy during which it has spent millions to protect its investment may be said to reflect a realistic recognition of the true value of the Class B shares. If the objectors' evaluation of \$4,000 or more per share is sound, then Alleghany, owning in excess of 21,000 shares, has, after many years of litigation, suddenly given up the ghost and yielded more than \$40,000,000⁽⁵⁸⁾—hardly a likelihood in view of the history of events and the sophistication of its financial executives and advisers.

Also, it is not without significance that objector Garfield's securities expert, who on the capitalization of earnings method fixes a value of "over \$4,000" a share for the Class B stock, nonetheless concludes "that if the impasse between the Class A and the Class B is to be settled, there must be a compromise at a lower figure to reflect the lack of voting control of the Class B"⁽⁵⁹⁾—another way of saying that any evaluation of the stock must make allowance for its encumbered status. Obviously that compromise figure cannot be a matter of mathematical precision; it need not be; it is a matter of judgment based upon a consideration of factors pro and con, some of which have been adverted to above. This Court is satisfied that the package of \$850-16 shares common stock in exchange for each Class B share cannot be said to be inadequate, especially so when considered as a compromise.

However, the objectors argue that even so, the plan is unfair in that the compromise should be only in terms of new common stock and not include any cash payment. They contend that the \$850 cash payment per share will be taxed as ordinary income, and with their individual income situations they will be subjected to high surtax rates, whereas Alleghany, by reason of its corporate structure, faces, with respect to the cash payment, a 7.2% rate. Objector Garfield contends that under the cash-stock exchange, Alleghany will benefit by over \$4,000,000 in comparison with an all stock plan. Several alternative plans, including a tax free exchange (24½ shares of new common instead of the \$850-16 shares for each Class B share) are proposed by objectors as being more equitable. Many of these suggestions were considered during the course of the extended negotiations. One such plan envisaged giving the minority Class B stockholders an option to receive all stock (24½ shares) in exchange for each Class B share instead of the \$850-16 share package. However, based upon the opinion of independent tax counsel retained especially by the Class B representatives, other than Alleghany, this alternative was rejected since its tax consequences were potentially more unfavorable than those under the cash and stock exchange. Independent tax counsel was of the view that such an option would have exposed a substantial portion of the shares to ordinary income tax treatment.

Another approach would have eliminated the cash payment and given only stock to all Class B stockholders, including Alleghany. This proposal met with rejection because it would lower Mississippi's degree of control below its present level and further could fail to eliminate the present divided control within MoPac since Mississippi would control the preferred but not necessarily the common. To assure elimination of the divided control, as well as the friction and litigation it has engendered, Mississippi deems it essential that it have a substantial majority interest in both classes of stock. This accounts for its cash tender offer to purchase not less than 400,000 shares of new common at \$40,000,000 and Alleghany's commitment to tender all its 339,868 shares of new common stock upon their receipt. Additionally, the proposal would place Alleghany in a minority position without real control over its investment and deprive it of the veto power it now has as the majority owner of the present Class B stock. Neither Mississippi nor Alleghany was amenable to this situation. Objector Garfield's suggestion that if Mississippi desires to retain its present degree of stock control that it purchase the additional shares of the new common stock to be issued to Alleghany under an all stock exchange would require Mississippi to expend, in addition to its present commitment of \$40 million cash, another \$20 million, an added obligation it is not prepared to assume.

(58) Even assuming objector Garfield's contention as to tax consequences is correct (see p. 47 *infra*), an alleged tax benefit of \$4,000,000 to Alleghany under the part cash payment plan would hardly justify giving up \$40,000,000.

(59) Affidavit of David M. Day, Jan. 30, 1973, ¶ 5.

Whether or not the reasons for rejection of the alternative proposals were justified is not the question before this Court, which is called upon to decide whether the settlement reached by the litigants and submitted for approval is fair and reasonable. The discharge of this function does not require the Court to reopen negotiations in an effort to secure more advantageous terms, which plaintiffs, in sophisticated and arms length bargaining, were unable to secure for themselves and the class they represent. Taxes are taxes; the rates are fixed by Congress; they cannot be adjusted in particular cases to accommodate an individual taxpayer's obligation as to income derived from the settlement of a lawsuit. The tax will vary in the instance of each Class B stockholder dependent upon his particular bracket, and even corporations other than Alleghany, which may own Class B stock, will face varying tax payments. The fact is that two-thirds of the conversion package is tax free. Moreover, were the case to proceed to trial and plaintiffs secured a judgment declaring the Class B stockholders entitled to dividends in given years, the entire proceeds received by each shareholder would be taxed as ordinary income. Under all these circumstances, it cannot be said that the \$850 cash payment constituting part of the conversion rate is unfair.

OTHER OBJECTIONS

Several objectors question the adequacy of the notice of the proposed settlement given to stockholders, which was mailed to each registered stockholder and published in the Wall Street Journal (National Edition). The objections go to the contents of the notice. However, it sufficiently informed any interested stockholder of the nature of the pending action, the general terms of the settlement, that complete and detailed information was available from the files of this Court, and that any stockholder could appear and be heard at the hearing; in sum, the notice fairly apprised the members of the class of the pertinent terms of the proposed compromise and the significance of the entry of a final judgment approving the settlement.⁽⁶⁰⁾

Two Class A stockholders of fifty shares object because the settlement is contingent upon Mississippi's ability to finance its tendered offer obligation, and therefore, "if such financing is not available, the parties will have gone to considerable expense . . . to no good purpose." However, Mississippi already has secured a formal commitment of financing which has been found satisfactory by Alleghany and its counsel.⁽⁶¹⁾ The same objectors also express concern over the possible effects of the cash payout upon MoPac's financial structure. MoPac has represented that this presents no problem to a railroad of its size.⁽⁶²⁾

A MoPac debenture holder has raised a question as to possible impairment of the rights of debenture holders. Under the terms of the settlement, an opinion of MoPac's counsel is required to the effect that none of the transactions are in breach or in default of any of the provisions of any indenture or other instrument binding upon MoPac. It is represented to the Court that MoPac's counsel upon a review of all documents is prepared to render such an opinion.

Objections are made to fees requested by attorneys representing the respective plaintiffs. To the extent that such allowance may be granted, the parties are to be paid equally by Mississippi and MoPac. However, the fee applications are, in the event of acceptance of the settlement, subject to approval by the Court and a separate hearing, notice of which will be given to all interested parties, at which time any objections may be presented to the Court.

CONCLUSION

This Court, after thorough consideration of all pertinent factors and of the extensive contentions of the objectors and proponents with respect thereto, and weighing the benefits to be derived from the settlement against the alternative of a continuance of this litigation, with its outcome doubtful, and, even

⁽⁶⁰⁾ Cf. *Air Lines Stewards Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 108 (7th Cir. 1972); see *United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co.*, 447 F.2d 647, 654 (7th Cir. 1971); see also *Winkleman v. General Motors Corp.*, 48 F. Supp. 490, 494 (S.D.N.Y. 1942).

⁽⁶¹⁾ Defendant's Supplemental Reply Memorandum at 56; Hearing Minutes at 41-42.

⁽⁶²⁾ See *Jones Affidavit* at 5; *Affidavit of Downing B. Jenks*, Jan. 22, 1973, at 10.

if successful, the uncertainty of any meaningful recovery, concludes that the settlement falls within a "range of reasonableness"⁽⁶³⁾ that warrants its approval. In sum, it offers a permanent solution to the longstanding impasse between the two contending groups of stockholders—a result that cannot be achieved through successful litigation. Indeed, continued litigation may be said to be an exercise in futility since the hard core of the cause of the differences between the two groups would remain and continue to plague them and MoPac. The settlement will afford MoPac the opportunity to pursue merger prospects so vital to its economic growth and existence and to permit its officials to give full time and attention to corporate affairs. Also it means the prospect of greater annual dividends to the Class B stockholders; a broader market for their shares; and the opportunity for representation on the Board of Directors. Even were it to be found that the Class B stock approached the approximate \$4,000 value per share as estimated by a number of objectors, the settlement still would come within a range of reasonableness and warrant approval. Finally, if a majority of the minority Class B stockholders are of the view that the advantages of the settlement are insufficient to compensate for what they believe to be the value of their shares, they have the power to reject it.

The settlement is approved and judgment may be entered accordingly.

Dated: New York, N. Y.
March 19, 1973

EDWARD WEINFELD
United States District Judge

⁽⁶³⁾ See *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.), cert. denied, U.S. (1972); see also *United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co.*, 447 F.2d 647, 655-56 (7th Cir. 1971).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, ALLEGHANY CORPORATION
and ROBERT LEVASSEUR,

Plaintiffs,

-against-

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT, T. C. DAVIS and
THOMAS P. MILBANK,

Defendants.

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67 Civil 5095

OPINION

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The general factors to be considered in awarding fees in litigation of this type have recently been specified by our Court of Appeals in City of Detroit v. Grinnell Corp.,⁽³⁾ and need not be enumerated in detail. Although that was an antitrust suit, the same general standards may be applied. While they serve as guides, no precise or mathematical formula is mandated; what is required is that, giving due consideration to all relevant and significant factors, the court award a sum that is fair and reasonable -- one that is neither excessive nor inadequate.⁽⁴⁾

A preliminary word is in order. The applicants, in stressing the value of their services in terms of benefit to the Class B shareholders, refer to the \$850-16 share package of new common stock for each share of old Class B stock as a conversion rate of \$2,450, reflecting a gross settlement of \$97,340,950 for all 39,731 shares of the old Class B stock. Thus, Alleghany, applying the \$2,450

(3) ___ F.2d ___, Docket Nos. 73-1211, 73-1420 (Mar. 13, 1974); see Lindy Eros Builders v. American R. & S. San. Corp., 487 F.2d 161 (3d Cir. 1973).

(4) Cf. Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045 (2d Cir. 1973).

applications, five shareholders objected to the payment of the fees as requested, but generally their views reflected continuing objection to the settlement. Two of them, owners of Class A stock, opposed payment of fees by MoPac on the ground that only the Class B stockholders or other allied interests should be assessed the costs of the litigation. The court finds that the objections raised are without substance. The settlement, as this court noted in approving it, was of substantial value to the B stockholders; it was also of substantial value to the corporation and necessarily all its stockholders in ending the costly litigation which, had it gone to trial, whatever its outcome, would not have ended the strife between the two classes, with continuing diversion of MoPac's officers from their essential duties in operating the railroad and advancing its other economic interests. MoPac's commitment to pay one-half the allowed fees may be considered an additional cash payment to the Class B shareholders as part of the settlement, so that what they received is on a net basis. Accordingly, the sole issue that remains is what is a fair and reasonable allowance for the services by the respective applicants.

Alleghany Corporation for reimbursement of fees paid by it for legal, expert and consultant services; also, the application of attorneys for plaintiffs Levin and LeVasseur for allowances for their services, plus disbursements. Under the terms of the settlement the allowances awarded by the court are to be paid equally by defendants Mississippi River Corporation ("Mississippi") and MoPac.

The notice to stockholders stated that Alleghany's request for reimbursement in the sum of \$850,000 would not be opposed by MoPac and Mississippi; it also stated that the Levin-LeVasseur attorneys' application for an allowance in the sum of \$6,953,000 would be opposed by MoPac and Mississippi. After the affirmance of the judgment authorizing the settlement and following approval by the stockholders and by the Interstate Commerce Commission, the interested parties, in a desire to avoid litigation on the fee issue, reached an agreement whereby the Levin and LeVasseur attorneys limited their application for fees to \$2,000,000, plus disbursements of \$22,422.06, which Mississippi and MoPac would not oppose.

Upon the return date of the hearing of these

EDWARD WEINFELD, D. J.

This is the final stage in the settlement of these consolidated class actions; hopefully, the closing chapter in the controversy and litigations in which the Class A and Class B shareholders of the Missouri Pacific Railroad Company ("MoPac") have been embroiled for almost two decades. Familiarity is assumed with this court's opinion approving the terms of the settlement,⁽¹⁾ as well as with the related litigation which established the voting rights of the Class B stock.⁽²⁾ The notices sent to stockholders of the hearing upon terms of the proposed settlement also set forth the applications by attorneys for allowances and that their consideration would be deferred until after entry of final judgment. The settlement pursuant to the final judgment has been fully consummated. The matter now before the court is the application of plaintiff

(1) *Levin v. Mississippi River Corp.*, 59 F.R.D. 353 (S.D.N.Y.), aff'd on opinion below sub nom. *Wasson v. Mississippi River Corp.*, 486 F.2d 1398 (2d Cir.), cert. denied, 414 U.S. 1112 (1973).

(2) *Slayton v. Missouri Pac. R.R.*, 233 F. Supp. 747 (E.D. Mo. 1964), rev'd sub nom. *Mississippi River Fuel Corp. v. Slayton*, 359 F.2d 106 (8th Cir. 1966), rev'd sub nom. *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162 (1967).

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per Class B share exchange factor, notes that the average highest annual bid price for Class B shares for the period from 1965 to 1971, following the Supreme Court's ruling in the voting rights case, was approximately \$1,778. Based upon the 39,731 Class B shares outstanding on December 31, 1971, Alleghany argues that this amounts to an aggregate increase in the value of the Class B stock of at least \$26,699,232, and stresses that its requested allowance of \$850,000 is about 3% of the aggregate increase in the value of the Class B stock. The Levin-LeVasseur attorneys, using the same exchange factor of \$2,450, take the market value of the Class B stock after the Eighth Circuit Court of Appeals ruling (rejecting class voting rights) and just prior to the Supreme Court's granting of certiorari, \$530 per share, and compute the net benefit to the Class B shareholders at \$76,283,520. This conceptual theory of benefit somewhat overstates the matter. The Class B shareholders received for their shares what the court deemed a fair and reasonable equivalent on a compromise basis to put an end to continuing controversy between them and the Class A stockholders -- a settlement that offered "a permanent solution to the longstanding

(5) impasse." This was no recovery of a cash fund or securities which gave the shareholders something of value they did not already own. They were exchanging stock already in hand for other stock of a different class plus cash on a basis deemed to be fair and reasonable in the light of the respective rights of the two groups of litigants, the strength and weaknesses of their respective positions, the probabilities of ultimate success upon a trial, and an evaluation of the terms of the settlement compared with the likely benefits in the event of success upon a trial. However, rejecting the applicants' theory in no respect diminishes the value of their services in achieving a favorable settlement with its consequent and anticipated benefits to the corporation and its stockholders. On the basis of the sixteen shares received by the Class B stockholders, their annual dividends at \$5 per share will be \$80 instead of the \$5 previously declared; also the marketability of the common shares is improved and the settlement is net to each shareholder. Other benefits are set forth in the court's opinion approving the settle-

(5) Levin v. Mississippi River Corp., 59 F.R.D. 353, 373 (S.D.N.Y. 1973).

ment. Indeed, the simple fact is that the settlement achieved more for the Class B stockholders than if they had been successful in the litigation, since it at once removed the root cause of their continuing controversy, whereas even success in litigation would not have brought about that result.

The principal thrust of the plaintiffs' claims was directed toward MoPac's restricted dividend policy and the relief sought included the declaration of additional dividends in prior years and increased dividend distribution in the future. The issues raised by the defense required not only legal services of a high order, but the advice and assistance of certified public accountants, investment analysts and railroad economists. The pretrial discovery and preparation for trial involved the study of the complex history of MoPac's reorganization, including analysis of the various ICC opinions relating to the several proposed plans, the voting rights litigation, and relevant accounting principles, and evaluation of volumes of corporate financial data of defendants' and other railroads.

The discovery process, of necessity, was extensive. It encompassed not only depositions of witnesses, but the preparation of meaningful interrogatories and exhaustive inspection and investigation of defendants' files in an effort to obtain documentary support for plaintiffs' contentions, including the allegations of conspiratorial conduct to withhold dividends in order to depress the price of the Class B stock. The importance of dredging up meaningful information to establish the plaintiffs' claims necessarily required the services of senior rather than associate attorneys in the deposition discovery process. The negotiations leading to the settlement, which at times appeared impossible of achievement, were prolonged and were consummated only on the eve of trial when the attorneys were fully prepared, on the basis of their pretrial activities, to proceed to trial. After the settlement was reached, the attorneys expended considerable time in meeting objections to its approval, and after its approval, in seeking to uphold it in the Court of Appeals and before the ICC, and also thereafter in effectuating its terms.

ALLEGHANY'S APPLICATION

This action was commenced by plaintiff Levin in December 1967. Alleghany intervened by leave of court, as did plaintiff LeVasseur. The action was ordered to be maintained as a class action on behalf of all Class B stockholders. Alleghany was the largest Class B stockholder, owning 53%. This majority position obviously made it more than an average litigant in the protection of its interests. Alleghany's attorneys were Donovan, Leisure, Newton & Irvine, and in all, their fees and expenses and those for the services of other law firms, accountants and financial experts, totalled \$850,000, for which Alleghany seeks reimbursement.

Alleghany's attorneys expended a total of 14,312-1/2 hours in the prosecution and settlement of the action, which included those of senior partners and associates billed at rates charged by that firm and others of similar standing, and totalling \$680,234.68. Upon the hearing a senior partner testified that since the onset of the litigations the attorneys had agreed to bill Alleghany at the rate of \$65 per hour for partners' time

and \$40 per hour for associates' time, averaging \$47.50
(6)
per hour. The attorneys' disbursements amounted to
\$59,712.20, or a grand total for Alleghany's attorneys'
fees and expenses of \$739,946.88, most of which Alleghany
has already paid and has agreed to pay the balance. In
addition, to assist in the prosecution and settlement of
the action, the attorneys retained the services of other
law firms, a certified public accountant, and management,
transportation and economic consultants, whose charges
they certified as fair and reasonable, and which totalled
\$110,053.12, which Alleghany has paid. Thus, the total
paid or owed by Alleghany for all services is \$850,000.

The sum requested, measured by any applicable
standard -- whether the benefits conferred upon the class,
the importance of the litigation to the public, the com-
plexity, magnitude and difficulty of the case, the hours
expended by lawyers, their status and standing at the bar
or the rates charged -- is fair and reasonable, if not on
the modest side. Alleghany's application for reimbursement
in the sum of \$850,000 is granted.

(6) At the hearing objectants were afforded an opportunity
to cross-examine the attorneys who testified as to their
services.

APPLICATION OF ATTORNEYS
FOR LEVIN AND LEVASSEUR

Plaintiffs Levin and LeVasseur were substantial owners of Class B stock. Plaintiff Alleghany, as the majority owner of the Class B stock, had a veto power over corporate action that required the separate approval of the Class B stock; accordingly, independent representation of the minority Class B group was fully justified. In addition to the principal class action claims with respect to MoPac dividend policy, the Levin-LeVasseur group asserted derivative claims on behalf of MoPac. Orens, Elsen & Polstein represented plaintiff Levin, and Domerantz, Levy, Haudok & Block represented plaintiff LeVasseur, but they cooperated and their application is (7) a joint one.

While in some measure the activities of the Levin-LeVasseur attorneys and Alleghany's ran a parallel course, in other respects it did not; in any event, the

(7) The application also includes services of other counsel engaged in this and related litigation, which are set forth in the affidavits in support of the requested allowances. Counsel have agreed among themselves as to the allocation of any award, so it is not necessary for the court to make a specific allocation.

attorneys acted independently in espousing the interests
(8)
of the Class B minority group. They also represented
minority Class B interests in the Missouri action which
determined the voting rights of the Class B stockholders.
The attorneys request an allowance of \$2,000,000, reduced
from their original request of \$6,953,000, as noted above,
and \$22,422.06 for disbursements. These applicants urge
that since McFae and Mississippi are obligated to pay any
fee award, their agreement not to oppose the reduced ap-
plication, particularly in view of their opposition to
the originally requested amount, affords strong assurance
of its reasonableness and accordingly should be given great
if not decisive, weight. However, to accept as conclusive
the parties' agreement as to fees in a class or derivative
action would mean the surrender of the court's duty and
its discretion. The agreement, while it may have some
relevance, does not relieve the court of its duty to make
an independent appraisal, to "avoid awarding 'windfall fees'
and . . . likewise avoid every appearance of having done so,"
and to award only such fees that are fair, "with an eye to

(8) See Levin v. Mississippi River Corp., 59 F.R.D. 353, 367
(S.D.N.Y. 1973).

(9)
moderation" based upon the applicable standards.

The award is sought for services rendered over a ten-year period in this and the related predecessor actions wherein the voting rights of the Class B stock were defined.⁽¹⁰⁾ The effectiveness and skill of the attorneys who espoused the interests of the Class B stockholders are attested to by the settlement itself. They are of considerable experience in class and derivative stockholder litigation, and their expertise was brought to bear in the instant case on behalf of their clients. Because of the magnitude, complexity and importance of the issues, the lawyers who participated in the various aspects of the litigation in the main were senior attorneys. They were opposed by eminent and able attorneys representing the defendants. The pretrial procedures were conducted with conspicuous ability and were of signal importance in achieving the settlement. The services of the Levin-LeVasseur

(9) City of Detroit v. Grinnell Corp., ___ F.2d ___, Docket Nos. 73-1211, 73-1420 at pp. 2154-55 (2d Cir., Mar. 13, 1974).

(10) Slayton v. Missouri Pac. R.R., 233 F. Supp. 747 (E.D. Mo. 1964), rev'd sub nom. Mississippi River Fuel Corp. v. Slayton, 359 F.2d 106 (8th Cir. 1966), rev'd sub nom. Levin v. Mississippi River Fuel Corp., 386 U.S. 162 (1967).

attorneys were rendered on a wholly contingent basis and, unlike the Alleghany attorneys, no payment to date has been made to any of them. The total time expended by these attorneys, principally the seniors, was 11,083-1/4 hours. However, this is but one factor, and in this court's view only of relative importance in the instant case.

Upon the hearing of these applications the court questioned whether the portion of the time and the services rendered in the voting rights action which reached the Supreme Court were compensable in this action. After reflection I am satisfied that they are, since the right of the Class B stock to vote separately was the basis and hard core of this litigation. Indeed, the settlement of this action could only have been achieved because of the successful conclusion of the voting rights suits. (11) The effective veto power of the Class B stock obviously was a principal factor in bringing about the settlement. The fact that the attorneys' applications for fees in the Missouri action were not allowed does not foreclose granting allowances for such services. The Eighth Circuit Court

(11) Cf. *Angoff v. Goldfine*, 270 F.2d 185 (1st Cir. 1959).

of Appeals, which reversed the district court ruling which did grant them fees, acknowledged "[i]t is undisputed that the Class B stockholders obtained a very substantial benefit from the litigation they instituted and won,"⁽¹²⁾ but noted that "the right of the named plaintiffs and their attorneys to make a pro rata recovery of fees and expenses against the Class B stockholders . . . is not directly before us in this case,"⁽¹³⁾ and finally that any benefit to Hojac was only incidental to the main litigation which did not create a new fund for the corporation or the preservation of assets so as to warrant an allowance. Thus the request for special services is proper in this action, which may be considered a companion or related one.

It is at once apparent that these attorneys, on the basis of less hours than those expended by Allegheny's attorneys, are seeking a substantially higher allowance. The services of that firm in achieving the settlement were of equal value to those of the Levin-LeVasseur group. However, as was pointed out at the hearing, and as is the

(12) *Missouri Pac. R.R. v. Slayton*, 407 F.2d 1070, 1081 (8th Cir.), cert. denied, 395 U.S. 937 (1969).


(13) *Id.* at 1082.

fact, Alleghany's attorneys had a paying client; they received and would receive payment from their client no matter what the outcome of the litigation. These attorneys, however, faced the prospect of no compensation for almost ten years of extensive and conspicuous services if they did not prevail in this action. The success of the suit, with its thrust directed toward the dividend policy, which centered on the business judgment of directors, obviously could not be foretold -- as this court suggested, at best the probability of ultimate success upon a trial could only be one of "cautious prophecy."⁽¹⁴⁾ Taking into account the difficult and complex problems inherent in the litigations, the total results achieved for the class, the benefit to McPac, the skill and experience of the attorneys, the hours expended by senior and associate attorneys at prevailing rates, the high caliber of opposing counsel, the risk of no compensation or recovery of expenses in the event of nonrecovery, the court deems \$1,750,000 as fair and reasonable. These counsel are also entitled to reimbursement for disbursements in the sum of \$22,422.06.

(14) *Levin v. Mississippi River Corp.*, 59 F.R.D. 353, 366 (S.D.N.Y. 1973).

Judgment may be entered accordingly.

Dated: New York, N. Y.
June 26, 1974


United States District Judge

Before The
INTERSTATE COMMERCE COMMISSION

Docket No. 27346

APPLICATION OF MISSOURI PACIFIC RAILROAD COMPANY
UNDER SECTION 20a OF THE INTERSTATE COMMERCE ACT
FOR AN ORDER AUTHORIZING ISSUANCE OF SECURITIES

BRIEF OF ALLEGHANY CORPORATION, INTERVENOR IN
SUPPORT OF THE APPLICATION

PRELIMINARY STATEMENT

Alleghany Corporation (hereinafter "Alleghany"),
the beneficial owner of 53% of the Class B Common Stock*
of the Missouri Pacific Railroad Company (hereinafter
"MoPac"), was permitted to intervene in support of MoPac's
Application to issue securities. Alleghany joins in and

* Alleghany Corporation also owns 2,200 shares (or approxi-
mately one-ninth of one percent) of the Class A Common
Shares of Missouri Pacific Railroad.

adopts the proposed findings of fact and conclusions of law set forth in the brief of MoPac, and submits this brief as a supplemental statement and argument in support of the Application.

I

ALLEGHANY'S SUPPORT OF THE
PLAN OF REORGANIZATION IS
ENTITLED TO GREAT WEIGHT
BY THE COMMISSION IN CON-
SIDERING THIS APPLICATION

- A. The History of Alleghany's Defense of the Interests of the Class of MoPac B Stockholders Evidences its Present Determination and Ability to Protect Those Interests in the Proposed Reorganization of the Railroad.

The Reorganization.

Alleghany's tenacious and successful defense of the interests of the Class B common stockholders spans the period of the last forty years. During the period that MoPac had been in reorganization proceedings, from 1933 to 1956, four plans of reorganization had been proposed. Alleghany vigorously opposed the first three plans, which were rejected by the Commission, because each failed to give any consideration to the old common stockholders, the predecessors of the present Class B. Opinion of Weinfeld, J., Levin, et al. v. Mississippi River Corporation, et al.,

67 Civil 5095 (S.D.N.Y.), March 19, 1973 (hereinafter "Weinfeld opinion"), p. D-1. This opinion is Attachment D of the Proxy Statement which is annexed to the Supplement to Application filed herein.

Finally, the MoPac Trustee, Guy A. Thompson, at the direction of the Bankruptcy Court, by a process of mediation and conciliation, devised the so-called "Agreed System Plan" of 1954. The Interstate Commerce Commission approved this Plan, which gave recognition, in the capital structure of the reorganized railroad, to the interests of the old common stockholders in the form of the Class B stock. Missouri Pacific R.R. Reorganization, 290 ICC 477 (1954); approved, In Re Missouri Pacific R.R., 129 F. Supp. 392 (E.D. Mo. 1955), aff'd sub nom. Missouri Pacific R.R. 5-1/4% S.S.B.C. v. Thompson, 225 F.2d 761 (8th Cir. 1955).

The Voting Rights Litigation

In December 1963 the MoPac board of directors proposed that MoPac and its 83% owned subsidiary, Texas and Pacific Railroad Company ("T&P"), be consolidated into a new Delaware corporation, the Texas and Missouri Pacific Railroad Company ("T&MP").

The plan provided for an exchange of each MoPac share, without regard to class, for four shares of the new corporation and for an exchange of the T&P stock (other than

that owned by MOPAC) on a basis of one share of T&P for 4.8 shares of the new company. In January of 1964, the three companies filed a joint application with the Interstate Commerce Commission for an order under § 5(2) of the Act authorizing the consolidation and the issuance of securities by T&P under § 20a. In this application MOPAC advised that it would submit the proposed plan to its stockholders, for approval, by May of 1964 on the basis of a collective, rather than class, vote.

Alleghany and other B stockholders brought an action in the United States District Court for the Eastern District of Missouri seeking a declaration that the B stock was entitled to vote on the proposed consolidation as a separate class. The district court upheld this position, but the Court of Appeals for the Eighth Circuit reversed, and though its rationale was not entirely clear, it apparently held that the MOPAC charter and Missouri law were partially preempted by § 5 of the Interstate Commerce Act as construed in the light of the National Transportation Policy. On certiorari, the Supreme Court unanimously reversed the Court of Appeals. Levin v. Mississippi River Corp., et al., 386 U.S. 162 (1967), and held that a class vote was required. In the face of Alleghany's known opposition to the plan, it

was withdrawn by MoPac management. Thus, under Alleghany's leadership, the B Class was enabled to block a merger plan which proposed to treat the Class A and Class B stocks as though they were of equal value.

✓ The Dividend Litigation

Alleghany intervened in the suit to compel MoPac to pay reasonable dividends on the Class B stock, which was instituted by plaintiff Betty Levin in December 1967, and, as majority Class B stockholder, took the lead in prosecuting that suit. In September 1968 Judge Bryan ordered that the action be maintained as a class action, determining that the requirements of a class action under Rule 23(a), (b)(1) and (b)(2), Federal Rules of Civil Procedure, had been met. Weinfeld Opinion, p. D-3. One of these requirements is that "the representative parties will fairly and adequately protect the interests of the class." Rule 23(a)(4), Federal Rules of Civil Procedure. The nature of this action is described in the Weinfeld Opinion, pages D-3 through D-4. The parties engaged in extensive pretrial discovery beginning in 1968 and extending to the Fall of 1972. During that time, Alleghany's counsel had obtained, read and evaluated approximately 10,000 pages of documents from the files of the corporate defendants. This analysis alone took approximately 90 man days of work by Alleghany counsel and additional time by an accountant and securities expert, retained specially

for that purpose. Weinfeld Opinion, p. D-4.

Judge Weinfeld's Opinion observes that the representative plaintiffs in the dividends suit, and their counsel, "over a long period have been alert to enforce the rights of Class B stockholders." Opinion of Weinfeld, J., supra, at p. D-9. Judge Weinfeld gave great weight, in approving the fairness of the settlement, to Alleghany's past efforts in defense of the interests of the B Class:

"Alleghany, as the majority owner of the Class B stock, has, through the years, been the principal antagonist to Mississippi, the majority owner of the Class A stock. Widely divergent views as to the B stock's value have, up to the present, foreclosed any compromise. Alleghany's acceptance of the settlement as a disposition of their long-standing controversy during which it has spent millions to protect its investment may be said to reflect a realistic recognition of the true value of the Class B shares. If the objectors' evaluation of \$4,000 or more per share is sound, then Alleghany, owning in excess of 21,000 shares, has, after many years of litigation, suddenly given up the ghost and yielded more than \$40,000,000 -- hardly a likelihood in view of the history of events and the sophistication of its financial executives and advisers." Weinfeld Opinion, pp. D-12 to D-13.

It is evident therefore that Alleghany has assiduously and ardently defended its rights as a Class B stockholder and has in turn protected the rights of all other B stockholders for about 40 years.

B. Other Factors Indicate that Alleghany's Support of the Plan of Recapitalization is in the Interest of all Class B Stockholders

The first attempts to achieve a resolution of the long-standing differences between the two classes of MoPac stockholders long predate the dividends litigation. Weinfeld Opinion, p. D-4. During the pendency of the dividends action, the parties engaged in settlement discussions. These negotiations intensified while the parties were engaged in concluding their pretrial activities. Weinfeld Opinion, p. D-4. Throughout this period of negotiations, widely divergent views as to the B stock value had, almost to the eve of trial, foreclosed any compromise. Weinfeld Opinion, pp. D-12 to D-13. The District Court, in approving the settlement, recognized the significance of Alleghany's tenacious negotiating stance:

"Alleghany's acceptance of the settlement as a disposition of their longstanding controversy during which it has spent millions to protect its investment may be said to reflect a realistic recognition of the true value of the Class B shares." Weinfeld Opinion, p. D-13.

The Court also took note that Alleghany's ownership of 53% of the Class B stock "gives some assurance that it negotiated to obtain the best possible terms for that group vis-a-vis the Class A stockholders." Weinfeld Opinion, p. D-9.

The quality of representation on behalf of the B stockholders during these negotiations was high. This is recognized in Judge Weinfeld's Opinion:

"The record leaves no room to doubt that the negotiations were conducted in good faith and at arm's length, with the Class B stockholders represented by sophisticated, if not hardened, negotiators who deem the settlement the best obtainable without a trial on the issues on the merits." Weinfeld Opinion, p. D-9.

Alleghany's belief that the consideration for each Class B share is fair, reasonable and adequate is based upon the financial analysis of the value of the Class B stock by Alleghany's Vice-President Finance, Mr. John J. Burns. See Exhibit #13, Affidavit of John J. Burns. Mr. Burns' analysis is based upon the capitalized earnings method, which is also the basis of the analysis by Mr. F. J. Lee Jones, one of MoPac's financial experts (see Exhibit #2, Testimony of F. L. Lee Jones), and which method has been approved by Judge Weinfeld. See Weinfeld Opinion, pp. D-11 to D-12. For an extended analysis of the various methods of evaluation, including the statistical analysis and testimony of Miss Isabel Benham (Exhibit 6, Tr. 250 et seq.) see the full discussion in the MoPac brief.

Finally, each Class B stockholder will be entitled to receive exactly the same consideration for his Class B

share that Alleghany will receive. To the extent that Alleghany's majority position (which carried with it the power to veto certain corporate actions) has any "premium" value, that "premium" is included in the consideration to be received by each and every Class B shareholder alike.

II

THE TERMINATION OF ALLEGHANY'S INTEREST IN MOPAC SECURITIES WILL PROMOTE THE PUBLIC INTEREST

The divestiture of Alleghany's security holdings in MoPac, pursuant to the Plan of Reorganization, would promote the public interest.

In a prior proceeding before this Commission, Alleghany's acquisition of the Jones Motor Company, Inc., a common carrier by motor vehicle, was approved. Alleghany Corporation - Control and Purchase - Jones Motor Co., Inc. - and Control Erie Trucking Company, No. MC-F-10444, 109 MCC 333, decided January 27, 1970.

The Commission, as a condition to its authorization, ordered that the trusteeship of Alleghany's MoPac securities be continued. The Commission noted "... either in response to a petition or on its own motion [it may] institute an investigation to determine whether the trust should be continued or whether Alleghany's divestiture of

MoPac securities should be required," Alleghany Corporation
- Control and Purchase - Jones Motor Co., Inc. - and Control
Erie Trucking Company, supra, at 350.

Undoubtedly the Commission, in so ordering, weighed the unique characteristics of MoPac Class B stock, including the absence of a broad and liquid market for that security. (See Exhibit #2, Testimony of F. L. Lee Jones.) The Commission was undoubtedly aware that the sale of Alleghany's B shares in the usual way was simply impossible, and to so order would cause great financial injury to Alleghany as well as to the minority Class B stockholders, the price of whose stock would be substantially depressed by the forced sale of the controlling block of B shares.

Furthermore, it is clearly conducive to the public interest that the Commission be relieved of the obligation of overseeing this trust, while at the same time achieving a solution which will not harm Alleghany, which is also a carrier subject to the Commission's jurisdiction.

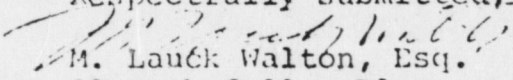
Clearly, an excellent procedure for eliminating or virtually eliminating Alleghany's ownership of MoPac B stock is that embodied in the Plan of Reorganization.

ment are hereby authorized and directed to consummate the

CONCLUSION

In addition to the arguments put forward by MoPac in support of the Application herein, the Commission, in considering this Application, should give great weight to Alleghany's support of the Plan of Recapitalization in view of Alleghany's history of safeguarding the interests of Class B stockholders and in view of the manner in which Alleghany, on behalf of the Class, conducted the negotiations which lead to the Plan of Recapitalization. Further, the Commission should find it in the public interest that the Plan be consummated in order to permit an orderly elimination or diminution of Alleghany's beneficial interest in MoPac's Class B stock.

Respectfully submitted,


M. Lauck Walton, Esq.
30 Rockefeller Plaza
New York, New York 10020
Attorney for Alleghany
Corporation

Of Counsel:

DONOVAN LEISURE NEWTON & IRVINE

SETTLEMENT AGREEMENT

THIS AGREEMENT, dated as of December 18, 1972, by and between ALLEGHANY CORPORATION ("Alleghany"), a Maryland corporation, MISSOURI PACIFIC RAILROAD COMPANY ("MoPac"), a Missouri corporation, and MISSISSIPPI RIVER CORPORATION ("MRC"), a Delaware corporation.

WITNESSETH:

WHEREAS, Alleghany, Betty Levin ("Levin") and Robert LeVasseur ("LeVasseur") (collectively, "Plaintiffs"), all of whom are Class B stockholders of MoPac, are maintaining, in the United States District Court for the Southern District of New York ("the Court"), an action ("the Action") entitled *Levin, et al. v. Mississippi River Corporation, et al.*, 67 Civ. 5095 (FW), against MoPac and MRC, and also against Robert H. Craft, T. C. Davis and Thomas F. Milbank, who are directors of MoPac and/or MRC, (collectively, "Defendants"); and

WHEREAS, Alleghany, Levin and LeVasseur are maintaining the Action on behalf of themselves and all other Class B stockholders of MoPac, and Levin and LeVasseur are also maintaining the Action derivatively on behalf of MoPac; and

WHEREAS, Defendants deny the material allegations made against them in the Action and assert that the claims alleged by Plaintiffs therein are without merit and are barred in whole or in part by affirmative defenses; and

WHEREAS, the parties hereto are convinced that the recapitalization of MoPac is desirable to promote the welfare of MoPac and all of its stockholders and to remove friction between different classes of its stockholders; and

WHEREAS, in order to put to rest the controversy between Plaintiffs, and all other stockholders of MoPac on whose behalf the Action was brought, and Defendants, and to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation, the parties hereto desire to settle and compromise the Action and all claims asserted therein; and

WHEREAS, Alleghany beneficially owns 21,243 shares, or approximately 53 percent, of the 39,731 shares outstanding of Class B stock of MoPac, and MRC beneficially owns 1,158,395 shares, or approximately 62 percent, of the 1,864,052 shares outstanding of Class A stock of MoPac; and

WHEREAS, pursuant to order of the Interstate Commerce Commission, the Class B stock beneficially owned by Alleghany is held by Franklin National Bank ("Franklin") as voting trustee, and is held of record either by Franklin or by a nominee or nominees thereof;

Now, THEREFORE, in consideration of the premises and of the mutual covenants hereinafter set forth, the parties hereto agree as follows:

1. RECAPITALIZATION, TENDER OFFER AND DISMISSAL OF THE ACTION.

1.1. *Recapitalization.* As promptly as practicable after approval by the Court of the terms of settlement contained herein, and after clearance, if necessary, of proxy materials by the Securities and Exchange Commission (which clearance MoPac will use its best efforts to obtain as promptly as practicable after such approval by the Court), MoPac shall cause a meeting of its stockholders to be duly held, at which it shall submit to such stockholders for their approval, pursuant to the applicable laws of the State of

Missouri and pursuant to the requirements for such approval set forth in Section 5.1(a) hereof: (a) the Plan of Recapitalization (the "Plan of Recapitalization") annexed hereto as Exhibit A [Attachment A to the Proxy Statement] and (b) an amendment (the "Amendment") to MoPac's Articles of Association in the form annexed to the Plan of Recapitalization. The Plan of Recapitalization provides for the recapitalization of MoPac on the following terms:

(a) The creation of a new class of 2,000,000 shares of \$5 Cumulative Preferred Stock, without par value, ("Preferred Stock"), each such share to be entitled to one vote, to a dividend preference of \$5 per annum, and to a preference of \$100 in the event of the liquidation, dissolution or winding-up of MoPac, and each such share to be convertible, at the option of the holder, into one share of Common Stock (as defined in (b) below) at any time after one year following a final and effective order of the Interstate Commerce Commission (as defined in Section 5.1(b) hereof) authorizing the issuance of the Preferred Stock and the Common Stock, and to be redeemable, at the option of the Company, for \$100 at any time after December 31, 1975; and the conversion of each share of MoPac Class A Stock outstanding on the "Effective Date" (as defined in Section 1.4 hereof) into one share of Preferred Stock.

(b) The creation of a new class of 3,000,000 shares of Common Stock, without par value, ("Common Stock"), each such share to be entitled to the rights set forth in the Amendment; and the conversion of each share of MoPac Class B Stock outstanding on the Effective Date into 10 shares of Common Stock and \$850 in cash.

1.2. *Tender Offer.* For a period of 15 business days, inclusive, commencing on the first business day after the Determination Date (as defined in Section 1.4 hereof) and subject to the terms below provided, MRC shall offer to purchase, on the Effective Date, for \$100 per share, such shares of MoPac Common Stock as are tendered to MRC. If fewer than 400,000 such shares are tendered, MRC shall be obligated to purchase all of such shares so tendered. If 400,000 or more of such shares are so tendered, MRC shall be obligated to purchase 400,000 of such shares and may purchase, at its option, any additional shares so tendered. Should MRC elect to purchase less than all of the tendered shares, the shares purchased by MRC shall be purchased as nearly as may be *pro rata*, disregarding fractions, according to the number of shares tendered by each person tendering shares. Alleghany agrees that all shares of Common Stock issuable on the Effective Date in exchange for shares of Class B Stock beneficially owned by Alleghany will be tendered to MRC. MRC shall notify Alleghany two days prior to the Effective Date of the number of Alleghany shares it will purchase.

1.3. *Manner of Making Tenders.* On the first business day after the Determination Date, MRC shall cause to be mailed (i) to each record owner of MoPac Class B Stock at the close of business on the Determination Date, other than record owners of Class B Stock beneficially owned only by Alleghany, and (ii) to Alleghany, a form or forms, approved by the Court, which shall (A) contain the tender offer by MRC provided for in Section 1.2 hereof and (B) provide appropriate means for such record owners and Alleghany to indicate how many, if any, of the shares of Common Stock issuable thereto (or in the case of Alleghany, issuable to Franklin or its nominees) on the Effective Date are to be tendered to MRC. Such forms shall contain the name and address of an exchange agent to be selected by MoPac ("Exchange Agent") to whom such forms shall be returnable. An election to tender shares of Common Stock to MRC shall be effected by the delivery to the Exchange Agent no later than the close of business on the last day of the tender offer, of forms appropriately filled out to reflect such tender, duly executed by the record owner making the same or by Alleghany, accompanied by certificates, duly tendered, representing all of the shares of Class B Stock owned of record by such record owner.

1.4. *Determination Date and Effective Date.* The Determination Date shall be the third business day after the last of the conditions contained in Sections 5.1 and 5.5 hereof has been fulfilled. The Effective Date shall be the fifth business day following the completion of the tender offer described in Section 1.2.

1.5. *Dismissal of the Action.* Subject to Sections 7.9 and 7.10 hereof, order and judgment dismissing the Action as to all Defendants with prejudice, and without costs to any party except as contemplated by this Agreement, may be entered by the Court as soon as possible after the approval by the Court of the terms of this Agreement.

2. WARRANTIES AND REPRESENTATIONS OF MoPac.

MoPac hereby warrants and represents, for the benefit of Plaintiffs and all other persons who are stockholders of MoPac (a) as of the date of this Agreement or (b) as of the Effective Date, as follows:

2.1. *Authority.* This Agreement has been duly authorized, executed and delivered by MoPac and constitutes a binding agreement of MoPac; and, subject only to approval by the Court of the terms of this Agreement, and to fulfillment of the conditions contained in Sections 5.1(a) and 5.1(b) hereof, MoPac has full power and authority to consummate the transactions contemplated hereby.

2.2. *Due Issuance.* The shares of MoPac Preferred Stock and Common Stock to be issued pursuant to the Plan of Recapitalization, when so issued, will have been validly authorized and issued by MoPac and will be fully paid and non-assessable.

2.3. *No Inconsistent Agreements.* Neither the execution of this Agreement, the issuance of MoPac Preferred Stock and Common Stock pursuant to the Plan of Recapitalization, nor any of the other transactions contemplated by this Agreement, has resulted or will result in a breach of any of the terms or provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument to which MoPac is a party or by which MoPac or property thereof is bound.

2.4. *Dividends.* The Board of Directors of MoPac anticipates that subject to business conditions and the financial position and results of operations of MoPac it will be in a position to authorize the payment of an annual dividend of at least \$5.00 per share on the presently outstanding Class B Stock, and the payment of quarterly dividends of \$1.25 per share on the Preferred Stock and at least \$1.25 per share quarterly on the Common Stock of MoPac following the tender offer, recapitalization and dismissal of the Action which are the subject of this Agreement.

2.5. *Other Negotiations.* MoPac was not engaged as of October 11, 1972, directly or indirectly, in any substantial negotiations or discussions with respect to any transaction (other than as provided for herein) involving a recapitalization, reorganization, merger, consolidation or sale of substantially all of the assets of MoPac.

2.6. *Compliance with Laws.* All acts to be performed by MoPac pursuant to this Agreement will be performed by it in full compliance with all material federal, state and local statutes, rules, regulations and other laws.

3. WARRANTIES AND REPRESENTATIONS OF MRC.

MRC hereby warrants and represents, for the benefit of MoPac, Plaintiffs, and all other persons who are stockholders of MoPac (a) as of the date of this Agreement or (b) as of the Effective Date, as follows:

3.1. *Authority.* This Agreement has been duly authorized, executed and delivered by MRC and constitutes a binding agreement of MRC; and, subject only to approval by the Court of the terms of this Agreement and to fulfillment of the conditions contained in Section 5.1 hereof, MRC has full power and authority to consummate the transactions contemplated hereby.

3.2 *No Inconsistent Agreements.* Neither the execution of this Agreement nor any of the transactions contemplated hereby has resulted or will result in a breach of any of the terms or provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument to which MRC is a party or by which MRC or property thereof is bound.

3.3 *Financing Commitments.* MRC has obtained, on terms satisfactory to it, a valid and binding bank loan commitment letter in an amount sufficient to permit it to consummate the tender offer and purchase of shares contemplated by Section 1.2 hereof, and has furnished counsel for Plaintiffs with true copies of such commitment letter. The warranties and representations made by MRC in such commitment letter are true and correct.

3.4 *Other Negotiations.* MRC was not engaged as of October 11, 1972, directly or indirectly, in any substantial negotiations or discussions with respect to any transaction (other than as provided for herein) involving a recapitalization, merger, consolidation or sale of substantially all of the assets of MoPac, or any sale or other disposition of MoPac stock owned or to be owned by MRC.

3.5 *Compliance with Laws.* All acts to be performed by MRC pursuant to this Agreement will be performed by it in full compliance with all material federal, state and local statutes, rules, regulations and other laws.

4. WARRANTIES AND REPRESENTATIONS OF ALLEGHANY.

Alleghany hereby warrants and represents to Defendants as follows:

4.1 *Number of Class A and Class B Shares Owned.* Alleghany is the beneficial owner of 21,243 shares of presently outstanding Class B Stock of MoPac and is the beneficial owner of 2,200 shares of presently outstanding Class A Stock of MoPac.

4.2 *Authority.* This Agreement has been duly authorized, executed and delivered by Alleghany, and constitutes a binding agreement of Alleghany; and, subject only to approval by the Court of the terms of this Agreement and to fulfillment of the conditions contained in Section 5.1 hereof, Alleghany has full power and authority to consummate the transactions contemplated hereby.

4.3 *No Inconsistent Agreements.* Neither the execution of this Agreement nor any of the transactions contemplated hereby has resulted or will result in a breach of any of the terms or provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument to which Alleghany is a party or by which Alleghany or property thereof is bound.

4.4 *Compliance with Laws.* All acts to be performed by Alleghany pursuant to this Agreement will be performed by it in full compliance with all material federal, state and local statutes, rules, regulations and other laws.

5. CONDITIONS TO THE OBLIGATIONS OF THE PARTIES.

5.1. The obligations of the parties under Sections 1.2, 1.3 and 6.1 hereof are subject to the fulfillment of the following conditions:

(a) *Approval by MoPac Stockholders.* The Amendment and Plan of Recapitalization shall have been approved by vote of 75% of the outstanding shares of Class A Stock including a majority of the outstanding shares of Class A Stock voted by holders of Class A Stock other than MRC and Alleghany (or Franklin or its nominees, as the case may be), and 75% of the outstanding shares of

Class B Stock including a majority of the outstanding shares of Class B Stock voted by holders of Class B Stock other than MRC and Alleghany (or Franklin or its nominees, as the case may be).

(b) *I.C.C. Matters.* The Interstate Commerce Commission shall have issued a final and effective order authorizing, without conditions or modifications, or on conditions or modifications acceptable to the parties and approved by the Court and the stockholders of MoPac (if in the opinion of MoPac such stockholder approval is required), (i) the issuance of the MoPac Preferred Stock and Common Stock pursuant to the Plan of Recapitalization, and (ii) any other matters concerning which MoPac deems it necessary to have Interstate Commerce Commission approval.

(c) *S.E.C. Matters.* (i) Either the Securities and Exchange Commission shall have issued an order, pursuant to Section 12(h) of the Securities Exchange Act of 1934, as amended ("the Exchange Act"), satisfactory to Alleghany and its counsel, Messrs. Donovan Leisure Newton & Irvine, exempting Alleghany from Section 16(b) of the Exchange Act to the extent of its participation in the transactions contemplated by this Agreement, or Alleghany shall have received from such counsel an opinion, satisfactory to Alleghany in form and substance, to the effect that Alleghany will not incur any liability under Section 16(b) of the Exchange Act in connection with the transactions contemplated by this Agreement;

(ii) Alleghany shall have obtained any necessary order from the Securities and Exchange Commission to exempt any of the acts to be performed by Alleghany pursuant to this Agreement which might be subject to the provisions of the Investment Company Act of 1940 as amended ("Investment Company Act"), or Alleghany and its counsel, Messrs. Donovan Leisure Newton & Irvine, shall have supplied Defendants and their respective counsel with an opinion of Alleghany's counsel, satisfactory to Defendants and their counsel in form and substance, to the effect that Alleghany would not be prohibited under the Investment Company Act from performing any of the acts to be performed by Alleghany pursuant to this Agreement.

(iii) Either the Securities and Exchange Commission shall have issued an order, pursuant to Section 12(h) of the Exchange Act, satisfactory to MRC and its counsel, Messrs. Dewey, Ballantine, Bushby, Palmer & Wood, exempting MRC from Section 16(b) of the Exchange Act to the extent of its participation in the transactions contemplated by this Agreement, or MRC shall have received from such counsel an opinion, satisfactory to MRC in form and substance, to the effect that MRC will not incur any liability under Section 16(b) of the Exchange Act in connection with the transactions contemplated by this Agreement.

(d) *MRC Financing.* MRC shall have available to it the necessary bank loans or other financing in amounts sufficient to permit MRC to consummate the tender offer and purchase of shares contemplated by Section 1.2 of this Agreement.

5.2. *Opinions of MoPac Counsel.* The right of MoPac to effectuate the Plan of Recapitalization and to cause the Amendment to become effective, and the obligation of Plaintiffs and MRC to convert their shares of MoPac stock pursuant thereto, are subject to the fulfillment of the following conditions:

(a) Plaintiffs and MRC shall have received from Messrs. Sullivan & Cromwell, counsel to MoPac, a written opinion, dated the Effective Date, to the effect that:

(i) This Agreement has been duly authorized, executed and delivered by MoPac and constitutes a binding agreement of MoPac; and MoPac has full power and authority to carry out the transactions contemplated hereby.

(ii) The shares of MoPac Preferred Stock and Common Stock into which the Class A Stock and Class B Stock are to be converted pursuant to the Plan of Recapitalization are validly authorized, issued and outstanding, and fully paid and nonassessable.

(iii) Either it is not necessary in connection with the conversion of Class A Stock into Preferred Stock and Class B Stock into Common Stock to register the Preferred Stock or Common Stock under the Securities Act of 1933, as amended, or a registration statement under such act is in effect with respect thereto.

(iv) All proceedings, consents or other authorizations or approvals of the Interstate Commerce Commission or of any other federal regulatory agency or federal governmental body required in connection with the consummation by MoPac of the transactions contemplated by this Agreement have been obtained and are in full force and effect.

In rendering its opinion hereunder, such counsel may rely, to the extent specified in its opinion, on factual information furnished by MoPac and on opinions rendered by local counsel.

(b) Plaintiffs and MRC shall have received from Messrs. Bryan, Cave, McPheeters & McRoberts, counsel to MoPac, a written opinion, dated the Effective Date, to the effect that:

(i) None of the transactions contemplated by this Agreement has resulted or will result in a breach of any of the terms and provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument, known to such counsel, to which MoPac is a party or by which MoPac or property thereof is bound.

(ii) All proceedings, orders, consents, or other authorizations or approvals of any state or local regulatory agency or other governmental body (other than in connection or as to compliance with provisions of the state securities or Blue Sky laws of any jurisdiction other than the State of Missouri) required in connection with the consummation by MoPac of the transactions contemplated by this Agreement have been obtained and are in full force and effect.

In rendering its opinion hereunder, such counsel may rely, to the extent specified in its opinion, on factual information furnished by MoPac and on opinions rendered by local counsel.

5.3. *Opinion of MRC Counsel.* The right of MRC to purchase shares of Common Stock tendered thereto pursuant to Sections 1.2 and 1.3 hereof, and the obligation of the holders of such shares to sell the same to MRC, are subject to the receipt by Plaintiffs from Messrs. Dewey, Ballantine, Bushby, Fainer & Wood, counsel to MRC, of a written opinion, dated the Effective Date, to the effect that:

(a) This Agreement has been duly authorized, executed and delivered by MRC and constitutes a binding agreement of MRC; and MRC has full power and authority to carry out the transactions contemplated hereby.

(b) None of the transactions contemplated hereby has resulted or will result in a breach of any of the terms and provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument, known to such counsel, to which MRC is a party or by which MRC or property thereof is bound.

(c) All proceedings, orders, consents, or other authorizations or approvals of any federal, state or local regulatory agency or other governmental body (other than in connection with or as to compliance with provisions of state securities or Blue Sky laws) required in connection with the consummation by MRC of the transactions contemplated by this Agreement have been obtained and are in full force and effect.

In rendering its opinion hereunder, such counsel may rely, to the extent specified in its opinion, on factual information furnished by MRC, and on opinions rendered by local counsel.

5.4. *Opinion of Alleghany Counsel.* The obligations of MoPac and MRC to consummate the Plan of Recapitalization and tender offer as provided in Section 6.1 hereof are subject to the receipt thereby

of a written opinion, dated the Effective Date, from Messrs. Donovan Leisure Newton & Irvine, counsel to Alleghany, to the effect that:

(a) This Agreement has been duly authorized, executed and delivered by Alleghany and constitutes a binding Agreement of Alleghany; and Alleghany has full power and authority to carry out the transactions contemplated hereby.

(b) None of the transactions contemplated hereby has resulted or will result in a breach of any of the terms and provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument, known to such counsel, to which Alleghany is a party or by which Alleghany or property thereof is bound.

(c) All proceedings, orders, consents, or other authorizations or approvals of any federal, state or local regulatory agency or other governmental body (other than in connection or as to compliance with provisions of the state securities or Blue Sky laws of any jurisdiction) required in connection with the consummation by Alleghany of the transactions contemplated by this Agreement have been obtained and are in full force and effect.

In rendering its opinion hereunder, such counsel may rely, to the extent specified in its opinion, on factual information furnished by Alleghany, and on opinions rendered by local counsel.

5.5. *Court Approval.* This settlement is subject to approval by the Court pursuant to Rules 23(e) and 23.1 of the Federal Rules of Civil Procedure (including any necessary approval of any change, amendment or modification of the terms hereof).

6. CLOSING.

6.1. *Action to be Taken at Closing.*

(a) A Closing under this Agreement will be held at 10:00 a.m., local time, on the Effective Date, at the offices of MoPac, 210 North 13th Street, St. Louis, Missouri, or such other place as may be mutually agreed upon by the parties hereto.

(b) The obligations of each of the parties hereto under this Section 6.1 are subject to performance of all of the actions to be performed pursuant to such section.

(c) The following action will be taken at the Closing:

(1) MoPac will cause the Amendment to be deposited with a custodian to be selected by the parties hereto (the "Custodian") for filing pursuant to Missouri law.

(2) The opinions of counsel referred to in Sections 5.2, 5.3 and 5.4 hereof will be deposited with the Custodian for delivery to the appropriate recipients.

(3) MoPac will deposit with the Custodian for delivery to an Exchange Agent the certificates representing the shares of Preferred Stock issuable to the former Class A stockholders pursuant to the Plan of Recapitalization.

(4) MoPac will deposit with the Custodian for delivery to an Exchange Agent certified or bank checks in the aggregate amount of the cash payable to the former Class B Stockholders pursuant to the Plan of Recapitalization and the certificates representing the shares of Common Stock issuable to the former Class B stockholders pursuant to the Plan of Recapitalization.

(5) MRC will deposit with the Custodian for delivery to an Exchange Agent certified or bank checks in the aggregate amount of the purchase price for the shares of Common Stock tendered to MRC by the former Class B stockholders and purchased by MRC.

(5) MoPac and MRC will deliver to the Custodian for delivery to Plaintiffs certified or bank checks in the aggregate amount of the allowances of fees and expenses, if any, referred to in Section 7.10 hereof.

(7) Immediately upon completion of all action specified in Section 6.1(c)(1) through (6), the Custodian will file the Amendment with the proper authorities and simultaneously deliver the options and cause the Amendment to become effective under Missouri law. Thereupon, the instruments and securities specified in Section 6.1(c)(3), (4), (5) and (6) shall be held by the Custodian for and shall be immediately deliverable to, the respective parties entitled thereto, as hereinafter provided.

(8) The Custodian will immediately deliver to the Exchange Agent the items mentioned in Section 6.1(c)(3), (4), and (5).

(9) The Exchange Agent will, (i) immediately pay and deliver to the former holders of shares of Class B Stock the certificates for which were duly tendered as provided in Section 1.3 or are duly tendered to MRC at the Closing, the cash and the certificates representing the Common Stock into which such shares have been converted (less any shares purchased by MRC and plus the cash paid by MRC for such shares purchased) pursuant to the Plan of Recapitalization; (ii) immediately deliver to MRC the certificates representing the shares of Common Stock purchased by it; (iii) hold as agent for each holder of former Class A shares the certificates representing the Preferred Stock into which such shares have been converted pursuant to the Plan of Recapitalization, for delivery upon surrender of certificates representing such former Class A shares; and (iv) hold as agent for each holder of former Class B shares represented by certificates not duly tendered to the Exchange Agent as provided in Section 1.3 or to MRC at the Closing, the cash and the certificates representing the Common Stock into which such shares have been converted pursuant to the Plan of Recapitalization, for payment and delivery upon surrender of certificates for such former Class B shares.

(d) The Custodian will deliver to Plaintiff Alleghany and to counsel for Plaintiffs Levin and LeVasseur, Messrs. Orans, Elsen & Polstein, and Messrs. Pomerantz, Levy, Haudek & Block, respectively, certified or bank checks for the allowances of fees and expenses referred to in Section 7.10 hereof, or, if such fees have not been awarded by the time of the Closing, the Defendants shall pay such fees and allowances to the persons and firms named above immediately after such award has become final.

7. FURTHER AGREEMENTS OF THE PARTIES.

7.1. *Submission to the Court.* The parties will use their best efforts to obtain the Court's approval of the terms of settlement contained in this Agreement. Without limiting the foregoing, as promptly as possible after the date of this Agreement the parties hereto will submit to the Court, for its approval after notice to MoPac stockholders as required by Rules 23(e) and 23.1 of the Federal Rules of Civil Procedure, the terms of settlement contained in this Agreement, and will also submit to the Court a proposed form of notice to such stockholders. All expenses of printing and mailing such notice will be borne jointly by MoPac and MRC.

7.2. *Stockholder Approval.* MoPac will use its best efforts to bring about the fulfillment of the condition contained in Section 5.1(a) hereof. Alleghany will use its best efforts to cause the shares of MoPac stock beneficially owned by it to be voted in favor of the Plan of Recapitalization and the Amendment. MRC will cause all shares of MoPac stock owned by it, beneficially or of record, to be voted in favor of the Plan of Recapitalization and the Amendment. MRC and Alleghany agree that, prior to the day following the Effective Date, they will not dispose of any shares of MoPac stock owned by them as of the date hereof beneficially or of record, other than pursuant to the Plan of Recapitalization and tender offer provided for herein.

7.3. *I.C.C. Application.* MoPac will file with the Interstate Commerce Commission an application for the order referred to in Section 5.1(b) hereof, and MoPac will use its best efforts to obtain such order as promptly as possible, and to bring about the fulfillment of the condition contained in Section 5.1(b) hereof.

7.4. *Non Severability of Recapitalization and Tender Offer.* The Plan of Recapitalization annexed hereto and the tender offer referred to in Section 1.2 hereof are mutually interdependent obligations.

7.5. *Limitation on Other Purchases.* MoPac and MRC agree that neither they, their subsidiaries, nor any person acting on their behalf shall purchase any shares of MoPac Preferred Stock or Common Stock for a price in excess of \$100 per share for a period of six months after the Effective Date.

7.6. *Further Limitation on Purchases.* Alleghany agrees that neither it nor any person acting in its behalf shall purchase any shares of MoPac Preferred Stock or Common Stock or MRC capital stock for a period of three years after the Effective Date.

7.7. *Termination.* In the event that the Closing contemplated by Section 6.1 of this Agreement does not take place on or before December 31, 1973, this Agreement may be terminated at the option of Alleghany, MoPac or MRC, by written notice to all of the parties hereto. Any termination under this Section 7.7 shall be without prejudice to any rights or remedies that any party may possess at the date of such termination by reason of any breach of this Agreement by any other party prior to such date.

7.8. *Limitations on Litigation.* By approval of this Agreement, Plaintiffs and Defendants and all members of the class represented by Plaintiffs are deemed to agree that nothing incident or relating to the subject matter of this Agreement, oral or written, including but not limited to negotiations and public announcements, may be used by any such party or class member against any other party or class member in the Action or in any other action, other than one to enforce rights and obligations created by or arising out of this Agreement. This limitation shall survive the termination of this Agreement.

7.9. *Retention of Jurisdiction by Court.* Upon the entry of the judgment referred to in Section 1.5 hereof, the Court shall nevertheless retain jurisdiction of the matter to supervise the consummation of the settlement and for the purpose of awarding the fees and allowances referred to in Section 7.10. If the settlement is not consummated, any party may move to reopen the judgment and no party shall oppose such application.

7.10. *Fees of Counsel.* After the entry of a final judgment by the Court approving the terms of settlement contained herein, and after such final judgment is no longer subject to appeal, Plaintiffs and/or counsel will apply to the Court for allowances of fees and expenses, including fees and disbursements of attorneys, accountants and experts; and Defendants will not oppose the granting of such allowances as in their judgment are reasonable. Any such allowances shall be paid by MoPac and MRC.

7.11. *Waiver of Future Actions.* Each named Plaintiff in the Action and any member of a class represented by a named Plaintiff in the Action, by approval of this Agreement, is deemed to waive any objection to the propriety of the representation contained in Section 2.4 hereof, and to the reasonableness of the dividends declared by MoPac for any period between the date of this Agreement and the Effective Date if declared as contemplated in Section 2.4 hereof.

7.12. *Cooperation in Effecting Settlement.* The parties agree that they and their respective counsel will cooperate and consult with one another fully, in preparing for and consummating the transactions contemplated by this Agreement.

7.13. *Best Efforts.* MoPac, MRC and Alleghany will use their respective best efforts to procure and cause to be delivered to the other parties, as contemplated by this Agreement, the opinions of their

respective counsel referred to in Sections 5.2, 5.3, and 5.4 hereof (including the use of their respective best efforts seasonably to obtain or bring about all such proceedings, consents, or other authorizations, approvals or actions as may be required to form the basis of such opinions). Alleghany and MRC will use their respective best efforts to bring about the fulfillment of the conditions contained in Section 5.1(c) hereof. MRC will use its best efforts to bring about the fulfillment of the conditions contained in Section 5.1(d) hereof.

7.14. *Exchange Listing.* Promptly after the Effective Date and for a period of five years thereafter, MoPac will use its best efforts to cause its Preferred Stock and Common Stock to be listed on the New York Stock Exchange, if during such time the Exchange's requirements for listing are met.

7.15. *Action to be Taken by Alleghany.* On the Determination Date or as promptly thereafter as possible, Alleghany will advise MoPac as to the name of each person who on such date held of record shares of Class B Stock beneficially owned by Alleghany, and as to the number of such shares so held by each such person.

7.16. *Survival.* The warranties, representations and other obligations contained in this Agreement shall survive the consummation of the transactions contemplated hereby, including the actions to be taken at the Closing hereunder.

7.17. *Entire Agreement.* This Agreement contains the entire agreement between the parties hereto with respect to the transactions contemplated hereby, and may not be modified or amended except by a writing duly executed by the party against whom the modification or amendment is asserted.

7.18. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed to constitute an original, but all of which together shall constitute the same agreement.

7.19. *Governing Law.* This Agreement shall be construed and applied according to the laws of the State of New York.

7.20. *Captions.* Captions are for reference only and do not constitute a part of this Agreement.

7.21. *Notices.* All notices hereunder shall be in writing and shall be deemed to have been duly given if personally delivered, telegraphed or mailed by certified mail as follows:

(a) If to Alleghany, to:

Mr. John J. Burns, Jr.
Alleghany Corporation
350 Park Avenue
New York, N. Y. 10022

copy to:

John E. Tobin, Esq.
Donovan Leisure Newton & Irvine
2 Wall Street
New York, N. Y. 10005

(b) If to MoPac, to:

Mark M. Hennelly, Esq.
Missouri Pacific Railroad Company
210 North 13th Street
St. Louis, Missouri 63103

copy to:

David W. Peck, Esq.
Sullivan & Cromwell
48 Wall Street
New York, N. Y. 10005

(c) If to MRC, to:

Cleon L. Burt, Esq.
Mississippi River Corporation
9900 Clayton Road
St. Louis, Missouri 63124

copy to:

Everett I. Willis, Esq.
Dewey, Ballantine, Bushby, Palmer & Wood
140 Broadway
New York, N. Y. 10005

or to such different person or address as the parties hereto may designate by written notice.

IN WITNESS WHEREOF, each party has caused this Agreement to be duly executed as of the date first above written.

ALLEGHANY CORPORATION

By JOHN J. BURNS, JR.
Vice President—Finance

ATTEST:

JARED C. HORTON
Vice President and Secretary

MISSOURI PACIFIC RAILROAD COMPANY

By D. B. JENKS
Chairman of the Board

ATTEST:

G. P. STRELINGER
Assistant Secretary

MISSISSIPPI RIVER CORPORATION

By THOMAS H. O'LEARY
Executive Vice President

ATTEST:

T. M. ARMSTRONG
Secretary

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
MAY 2, 1973

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BETTY LEVIN, ALLEGHANY CORPORATION :
and ROBERT LeVASSEUR, :

Plaintiffs, :

-against- :

MISSISSIPPI RIVER CORPORATION, :
MISSOURI PACIFIC RAILROAD COMPANY, :
ROBERT H. CRAFT, T. C. DAVIS :
and THOMAS F. MILBANK, :

Defendants. :

67 Civil 5095 (EW)

ORDER AND FINAL
JUDGMENT

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The parties to this action having submitted to the Court for its approval, pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, a Stipulation of Settlement dated December 18, 1972; and

By Order dated December 20, 1972, the Court having directed that a hearing be held on January 25, 1973, to determine whether the terms and provisions of the Stipulation of Settlement were fair, reasonable, adequate and proper and should be approved, and to determine whether final judgment should be entered in accordance with the Stipulation of Settlement and having directed that notice of the settlement hearing be given to the MoPac stockholders in a manner specified in the order; and

Notice of the hearing having been given to the stockholders in accordance with the order of December 20, 1972, it having been mailed, on December 27, 1972, to all stockholders of record of defendant Missouri Pacific Railroad

Company, as of the close of business on December 26, 1972, and it having been published in the national edition of The Wall Street Journal on December 27, 1972; and

On January 25, 1973, a hearing having been held to determine whether the proposed settlement embodied in the terms and provisions of the Stipulation of Settlement should be approved and at that hearing an opportunity having been provided for all proponents of and objectors to the proposed settlement to be heard and to submit papers for the consideration of the Court; and

The Court having considered the prior proceedings in this action, and the matters submitted to it, and after due deliberation having rendered an opinion on March 19, 1973, and having determined that a final judgment should be entered; it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That the terms and provisions of the Stipulation of Settlement dated December 18, 1972, are fair, reasonable, adequate and proper to the Missouri Pacific Railroad Company and to the members of the class consisting of all of its Class B stockholders, and the same are hereby approved, as per the opinion of the Court dated March 19, 1973.

2. That the notice to the stockholders of the hearing was fair, adequate and sufficient and constituted compliance with Rules 23(e) and 23.1 of the Federal Rules of Civil Procedure.

3. That any and all objections to the terms and provisions of the Stipulation of Settlement are hereby overruled.

4. That the parties to the Stipulation of Settlement are hereby authorized and directed to consummate the settlement of this action pursuant to the terms and provisions of the Stipulation of Settlement.

5. That ^{thereupon} the Complaint and Amended Complaint of Betty Levin, the Complaint and Amended Supplemental Complaint of Alleghany Corporation, and the Complaint of Robert LeVasseur are hereby dismissed as against all defendants on the merits, with prejudice and without costs to any party.

6. That the Court retains jurisdiction of all matters respecting the consummation of the settlement of this action pursuant to the Stipulation of Settlement and for the purpose of entertaining applications for attorneys' fees and expenses by counsel for plaintiffs Betty Levin and Robert LeVasseur and by plaintiff Alleghany Corporation.

Dated: New York, New York

~~April~~ ^{MAY 2}, 1973

Edward Weinfeld

EDWARD WEINFELD
U.S.D.J.

Judgment entered:

~~April~~ ^{MAY 2}, 1973

Thomas E. Ambrose
Acting Clerk